

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-8058

1238

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

—against—

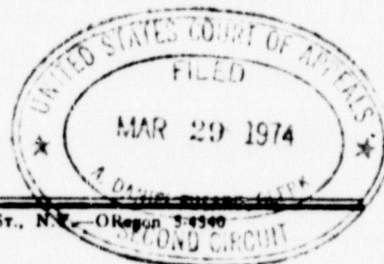
STANTON FREEMAN,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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April 17, 1974

A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Stanton Freeman
74-1238

Dear Sir:

My firm represents the Appellant in the above-captioned appeal. The Appellant's brief was filed on March 22, 1974 with some inadvertently uncorrected typographical errors. An associate of my office spoke to the Clerk's Office and was told one procedure to make corrections was to list these corrections in a letter. I therefore cite to the following:

- (a) Page 2, line 31:
"or cocaine: should read
"of cocaine";
- (b) Page 38, line 5:
"Jacques'" should read
"Jock's";
- (c) Page 55, line 30-31:
"before the trial" should read
"before June 13";
- (d) Page 63, line 21-22:
"(Decision, pp. 2-3)" should read
"(1028-1029)";
- (e) Page 71, line 6:
"Ornitz and Jack Davis" should read
"Ornitz, Freeman and Jock Davis";

A. Daniel Fusaro, Clerk
April 17, 1974
Page 2.

(f) Page 71, line 17:
"partitcipants" should read
"participants".

I trust you will bring the above corrections to the
attention of the Court.

Thank you for your cooperation.

Very truly yours,



MYRON BELDOCK

MB:ss

cc: AUSA Bernard J. Fried

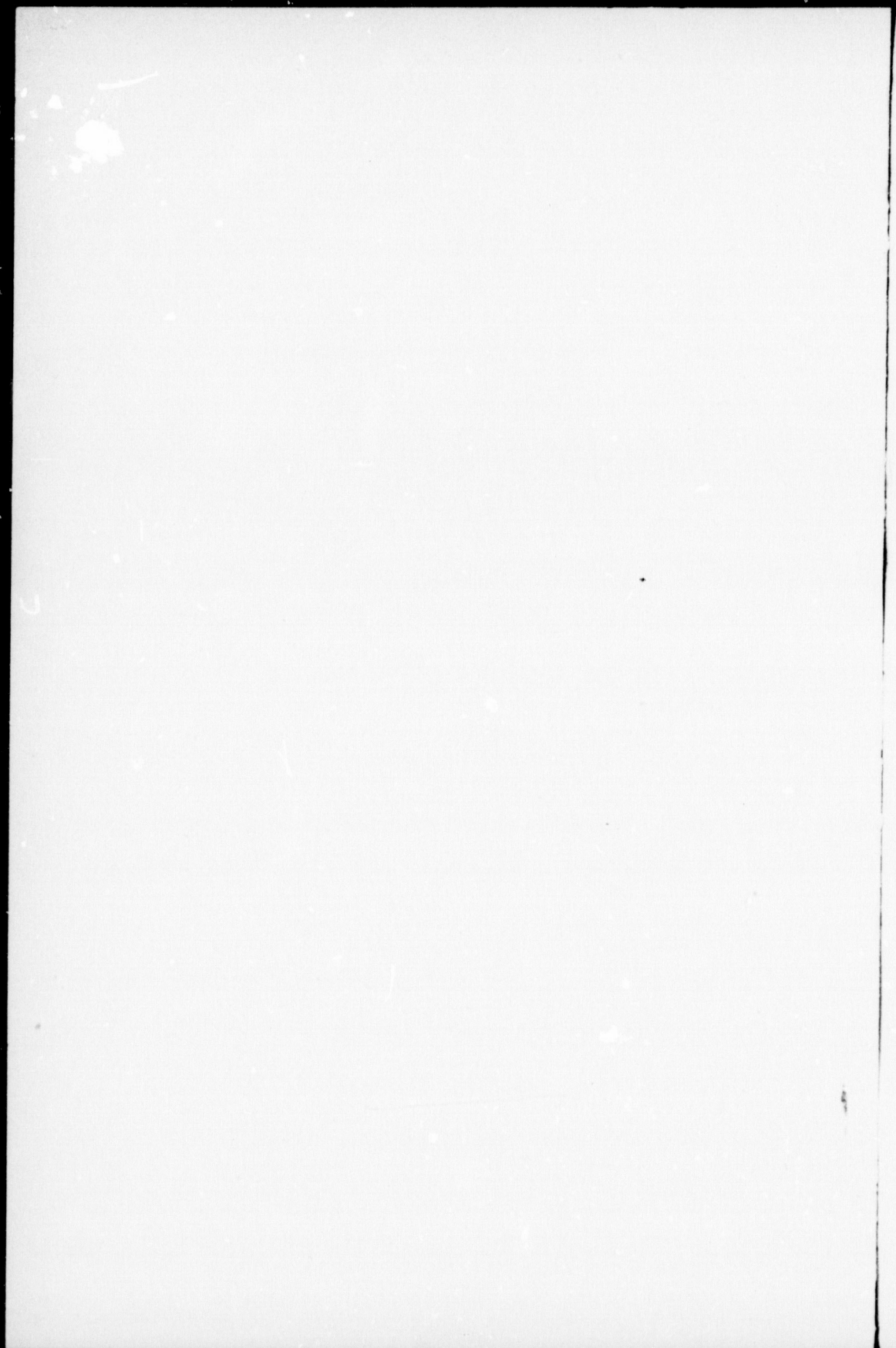


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United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

—against—

STANTON FREEMAN,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Statement of Issues

1. Should the charges have been dismissed or a directed verdict of acquittal granted where the only evidence against the defendant was circumstantial and the government was trying to prove he was a distributor at the end of a chain conspiracy who agreed to receive all or part of the shipment of 5 lbs. of cocaine, under the following circumstances:

The three principal conspirators were engaged in a single isolated transaction and had no connection with the defendant;

The alleged link between the principal conspirators and the defendant was a cocaine seller, who was not shown to have been previously involved in a scheme to import cocaine; was not shown to be an active participant in the principal conspiracy; had told one of the conspirators prior to the May 15, 1973 stated date for the inception of the conspiracy that cocaine could easily be sold in New York City; had, at or after the commencement of the conspiracy, been

present at an initial discussion between two of the conspirators concerning some of the details of their intended plan, but said or did nothing at that time or at any other time prior to the termination of the conspiracy upon the seizure of the drugs on June 13, 1973; was only shown to have gained knowledge, after the termination of the conspiracy, of the fact that the conspiratorial plan had been activated, a shipment of drugs had been attempted and certain arrests had taken place; and had, after termination of the conspiracy, aided one of its members in leaving the jurisdiction and aided others in obtaining counsel;

The alleged link had sold very modest amounts of cocaine to the defendant at unspecified times over a period of more than a year prior to April 1973 and also had a social relationship with the defendant, who was his friend;

The defendant and a co-defendant (whose charges were dismissed after the government's case) had, as an accommodation, purchased one ounce of cocaine from the alleged link a year to a year and a half prior to June 1973 and sold that ounce to an acquaintance of the co-defendant at cost;

The co-defendant had paid the defendant about \$250-\$300 for a total of about one-quarter ounce of cocaine on 3 to 5 occasions over a period of a year to a year and a half prior to April 1973, which cocaine had probably been obtained from the alleged link;

The defendant admitted having purchased modest and unspecified amounts of cocaine from the alleged link for his own use and as an accommodation to associates in the music business;

The defendant was not shown to have knowledge that the alleged link had ever been engaged in a scheme to import cocaine into the country;

The defendant, in June 1973 and prior to the June 13 seizure, had several meetings with the alleged link on his return from a trip abroad which was shown to be both social and related to defendant's business, but did not have anything to do with cocaine;

After the June 13, 1973 seizure of the cocaine and termination of the conspiracy, the defendant, at most, aided the alleged link and possibly one member of the conspiracy in leaving the jurisdiction before they could be questioned by government agents;

After the termination of the conspiracy, the defendant, when first questioned by the government agents, incorrectly denied knowledge of the said co-conspirator and made other incorrect denials of less substantial matters; and

The defendant subsequently advised the government of the correct facts, divulging much significant information of which the government had no other sources, including information pertinent to efforts to trace the alleged link and the co-conspirator who had left the jurisdiction.

2. Was the circumstantial evidence sufficient to prove the defendant's guilt beyond a reasonable doubt?

3. Was it reversible error to admit the testimony of a convicted drug smuggler, awaiting sentence, who had no connection with any members of the conspiracy at bar, to an incident approximately 22 months prior to June 1973

when he and the defendant, during one casual encounter unrelated to drugs, discussed regular supply to the defendant of cocaine in quantities, and when shortly after, the witness gave the defendant one gram of cocaine as a sample, where the court used this remote alleged prior bad act as a principal basis for its finding that the defendant was in the business of buying cocaine for distribution.

4. Did the court commit reversible error by inferring from the latter testimony and the aforementioned evidence of the defendant's purchases of cocaine for personal use and modest accommodation transactions at cost and the defendant's aforementioned aid to the alleged link and the one co-conspirator after the termination of the conspiracy, that the defendant had knowledge of, agreed to and participated in the conspiracy from its inception.

5. Did the court commit reversible error in failing to suppress certain evidence seized from the defendant where the only allegation concerning him in the affidavit submitted to obtain the arrest warrant was that he instructed a person to pick up the luggage of one of the conspirators at a hotel.

Statement of the Case

Defendant appeals from the January 4, 1974 judgment made by Hon. Jacob Mishler, United States District Judge, Eastern District of New York, convicting him on all four counts of the indictment: violations of 21 U.S.C. §§ 841 (a) (1), 952 and 955, and of conspiracy to violate those sections.

A superseding indictment filed June 28, 1973 charged Freeman and co-defendants Kim Ornitz, Francisco Rudge, Rosalys Kudner, Marilene Tombini and Hermano Albu-

querque, with conspiracy from May 15, 1973 through June 19, 1973 to import cocaine, to possess and distribute cocaine, to conceal the existence of the conspiracy and to prevent disclosure of its activities; and with three substantive counts of importation, possession with intent to distribute, and possession on board an aircraft. Rudner was never apprehended. Tombini and Rudge pleaded guilty and the Albuquerque charges were dismissed just prior to trial.

Freeman was found guilty after a six day non-jury trial (including suppression hearings) held in September, 1973. The charges against Ornitz were dismissed after the government's case. The Court's Memorandum of Decision containing findings of fact as to Freeman was filed October 5, 1973.

On January 4, 1974, Freeman was sentenced to concurrent terms of two years imprisonment and five years special parole on each count. He is currently on bail pending appeal pursuant to Judge Mishler's January 4, 1974 order.

Statement of Facts

The government's witnesses were co-defendant Tombini and Rudge; Rafael Duarte, a hotel assistant manager; David Duffy, a person originally under suspicion as a co-conspirator; John S. Davis, a person originally charged as a co-conspirator; Mark Etra, a convicted drug smuggler not yet sentenced; Agents Levine and Silvestro; and Chemist Boyd. On the defendant's case, Freeman testified as well as fact witnesses Jack B. Strange, Jr.; Nina Rao Cameron; Kim Ornitz; Joy Robbins; and Nicholas Patero, Esq.; and character witnesses Robert M. Heller, Esq. and Robert W. Cox, Esq.

The laboratory report (Exhibit 10) and testimony of U.S. Customs forensic chemist *John Boyd, Jr.* (265-277) established, in regard to the cocaine found in the Rosalys

Rudner bags seized on arrest of John Spencer Davis June 18, 1973; that the items were turned over by Agent Silvestro June 19, 1973; that the analysis was made August 14, 1973; that there were 3.2 grams total cocaine; that 2.7 grams were kept in a small metal container; and that .5 grams were kept in a small fabric pouch. Boyd did not have any information regarding any request to compare the cocaine he received with any other cocaine (269-270). Thus, there was no evidence to indicate a common source with the five pounds of cocaine which were the subject of the indictment.

RAFAEL A. DUARTE, Assistant Manager at the Central Paramount Hotel for 15 years, testified that Rosalys Rudner was registered in Room 1815 (351-3) as of June 13, 1973 (376). While on duty June 18, between 12:00 and 1:00 (353, 362), he received a phone call in reference to her baggage. The caller stated that her baggage was in the room and she could not return. Duarte then saw the bell-boy make a signal. Duarte interrupted the conversation and was told that government agents were watching to see if anyone picked up the bags. He told the party on the phone that the bags were in the checkroom and that in order to get them he would have to pay the bill. The party said that there would be no problem. Duarte asked for, and was given, the name "John Davis" (355-56). It was stipulated that the phone call was made by Stanton Freeman (353), without conceding the accuracy of Duarte's testimony of its content.

Mr. Duarte had spoken to Stanton Freeman's attorney before trial. At that time he did not say that the caller used the name "John"; but did say he was not sure whether the name used was "Davis" or "David" or whether he was given the name "Davis" on the phone or had heard the name afterwards (369). At the time of the conversation

with the attorney, he was "in doubt" (370). When he heard the attorney speak on the phone to AUSA Fried and relate to Fried the conversation the attorney had with Duarte, he did not correct the attorney (375). He later spoke to Agent Levine before the trial, on September 11, 1973, and was then told that the government had the name "John Davis" before the arrest (366-367).

MARILENE TOMBINI, a 22 year old Brazilian citizen and co-defendant, had pleaded guilty on September 4, 1973 to possession of cocaine on board an aircraft with the understanding that the government would dismiss the other counts of the indictment; that she would testify at this trial; and that the sentencing Judge would be made aware of her cooperation (281-3).*

She first became involved in this matter "at the end of May, 1973" when she was living in London with Hermano Albuquerque (283-4). She was visited by co-defendant Francisco Rudge, who she knew since she first came to the United States in 1971 (284-5; 281). They discussed a movie he wanted to make in South America in which she was to have a part but for which they had no money. "So he asked me if I could be a carrier for some cocaine" (284). She agreed knowing, without specification then, that she would get some money, and wanting to make the movie with him. She had never discussed cocaine before with either Rudge, Rudner or Albuquerque (331-2). There was no further discussion with Rudge in London about this matter (285).

Rudge left for New York and was followed on June 2, 1973 by Tombini and Albuquerque whose airline tickets were sent from New York City—"just a gift" from Rudge (285-6). Rudge and co-defendant Rosalys Rudner met

* Numerical references are to pages of the trial minutes.

them at the airport and they all went to the Hotel Albert (286-7). Importation of cocaine was discussed with Rudge a few days later at the Albert in the presence of Tombini, Rudner and Albuquerque (287), though Albuquerque did not participate in the discussion (288). The plan was that she would go to Buenos Aires and wait for Rudner who would give her the cocaine (288); and that on her return to New York she would give the cocaine to Rudge and Rudner (300-1). The amount of cocaine was not mentioned, but she was to receive \$5,000 (333-4). There was no other discussion with Rudge or Rudner concerning the importation of cocaine at that time (289) or prior to the time (June 7, 1973) Tombini left New York City for Buenos Aires (293; 332-3). Miss Tombini had met Miss Rudner about a year before in New York and had not seen her for a year before May 1973 (301), but thought of her as "my friend Rosalys" (308, 334).

Miss Tombini also testified regarding the purchase of the ticket, choice of hotel, meeting Rudner in Buenos Aires, receiving and transporting the cocaine to New York City and her arrest (290-309). Detailed analysis of this testimony is not considered necessary for purposes of this brief.

Miss Tombini did not know Freeman or Ornitz before the case came to court (309). She had not heard of either of them and did not know anything about them (314-5). Nor had she ever met a man named George Morao or George Simon or George Costa (315-16; 324) or a person named Theresa Costa (316). She first learned of the person referred to as George after she was arrested and through the lawyers (324). She had never (aside from the incident at bar) been involved in any discussion with Rudge or Rudner or Albuquerque regarding cocaine (332) and only spoke to them two times (233). She had never been a carrier for cocaine before (332).

She had no knowledge of any cocaine being in Rudner's luggage and as far as she knew Rudner didn't have any. She did know that Rosalys Rudner had "tried" cocaine. Rosalys spoke Portuguese and "very little" English (336-8).

FRANCISCO RUDGE, a Brazilian, first came to the United States in 1967 and, after a trip back in 1968, stayed here until he received his "residence" in January 1972 (379). He had pled guilty to the fourth count of the indictment with the understanding that the government promised to dismiss the other counts of this "as well as a prior indictment"; and promised, in exchange for his testimony, to "insert in the Probation Report" the fact that he had "co-operated" (380).

He did not know Freeman or Ornitz prior to his arrest (381) and had never heard their names before (402).

He and Miss Rudner had been living together for over a year (381). She helped him in his photography work (401). He knew George Morao and Theresa Costa, who were living together (382-3).

Rudge was a movie maker who travelled to South America in the Spring of 1973 because of his "movie making" (383). On a stop over in Bolivia he learned that it would be "very easy to buy" cocaine there and that the price was \$2,500 a kilo. He did not make "any definite arrangements" to purchase cocaine (384). When he came back to New York from his Brazilian trip, he met with George Morao around the end of February 1973 in Rudner's room at the Albert (385-6). Rudge said "How easy it was . . . to buy cocaine in Bolivia". George said "how easy it was to sell it in New York". Rudge asked him "about . . . the possibility of selling it"; and Morao said "that it would not be any problem in selling it". When asked whether he

"then" had the "intention" that Morao sell it for him or whether Rudge "then" had the "intention" of selling it himself, he answered "Well, I had a person that was telling me that he knew a way of disposing of it". But Rudge did not indicate to Morao "at that time anything concerning when [he] might, if at all, bring in cocaine into the United States" (386). Rudge testified: "At that time I wasn't thinking about it" (387).

The next conversation concerning cocaine at which Morao was present, along with Miss Rudner, took place "about the beginning of May or in May" at Rudner's room in the Albert (387). Rudge was asked to relate the conversation, including anything said by Rudner and Morao (387-8). Rudge testified that he said he was "thinking about doing it" and "if" he would, it would be "at the beginning of June". When asked, "What, if anything, at this time did Mr. Morao say", Rudge replied "He was just listening" (388). Rudge did *not* testify to Morao saying anything at this meeting (387-8). Asked whether a time came when he made a decision with Miss Rudner to do this, he said "I said that, 'Well, we can do it at the beginning of June' " (388). Rudge and Miss Rudner started planning it and by the end of May he went to London and met with Tombini and Albuquerque (388). Miss Tombini was "interested in the proposition" that she would bring the cocaine from Buenos Aires to New York (388-90).

When Rudge returned to the United States either May 30 or 31st, George Morao was not in New York (390-1). He did not have any further conversations with anybody concerning the cocaine from South America except with Rudner and Tombini in the beginning of June (391). When asked what was said, Rudge testified "that I would take care of part—you know, the purchase, and Miss Rudner would take care of the transportation of it" (391).

Rudge and Rudner flew to Bolivia on June 6, 1973 on separate airlines; Tombini was to come later (392). Rudge purchased two kilos of cocaine there for \$2,500 a kilo and delivered it to Rudner (392-3).

Rudge returned to New York on the morning of June 13, 1973 (393-5). On that evening Miss Rudner came to the Hotel Albert with "one" of the suitcases (Government's Exhibits 36 and 37) which Rudge identified as "my suitcases" (396-7). Rudner put the clothes she had in the room in the other suitcase (296). No one else was present (397). They had a conversation concerning the cocaine importation wherein she explained she didn't know what happened; that contrary to plan she went through Customs before Tombini; that she waited but Tombini never appeared; that as she was getting into a car she thought she saw Tombini on a cab line but when she went back she didn't see anybody; and that she then came to the hotel (397). Rudge put Rudner in a cab and sent her to the Paramount Hotel (398).

Later that evening, about two hours before his arrest, which was around 11:45 P.M. (400), Rudge spoke to Morao at the Hotel Albert (398). No one else was present (398). Rudge told Morao that "everything was very confused"; "that there was some coke coming in"; "that there was a possibility that the girl had been arrested"; and that he "had sent Miss Rudner to the . . . Paramount Hotel" and "that was it" (400).

Miss Rudner had her clothes in the suitcases. Rudge did not know if there was any cocaine in "that suitcase" (400).

Rudge did not see Morao again (401). He did not see or speak to Rudner again (401).

It was not part of the plan that any of the cocaine purchased in Bolivia be carried in Miss Rudner's luggage on

the flight from Buenos Aires to New York (402). All of that cocaine was to be taken by Miss Tombini in her luggage (402-4).

DAVID DUFFY, a 27 year old Manhattan resident, carpenter and part-time astrologer, had met Mr. Freeman (405). He first knew of him in 1967 or 1968 when Duffy was working with 40 or 50 other technicians putting in lighting at the Electric Circus which Freeman owned, but he did not know him then (436). The first contact he had with Freeman involved shish-kabobs and followed a conversation with Morao at Duffy's home on June 11, 1973 (437). Morao consulted him about where he could get meat, etc., wholesale to make several thousand shish-kabobs for the June 13th opening of Les Jardins at the Hotel Diplomat—a club, he understood from George, with which Freeman was connected—and they went together to the meat district at 2:00 or 3:00 A.M. for that purpose (437-8). Duffy spoke to Freeman June 12th on the telephone a couple of times when Freeman was trying to locate George about catering the affair (440). This plan fell through before the June 13th opening (441). Duffy first saw Freeman at the latter's house on June 16th (429, 452).

Duffy met George Morao November 1972 and knew him until June 1973 (406). He knew Morao's wife Theresa and her baby (406) for whom he had done astrology charts (438).

Duffy identified photographs of Rosalys Rudner (407). He never met Tombini, Rudge or Albuquerque (407).

In June 1973 he accompanied George and Theresa to several attorneys' offices (407). On June 13, around 4:00 P.M., he went with George, Theresa and the baby, to the office of attorney Nick Paterno concerning Theresa's immigration problem and scheduled hearing (407-8, 447).

Duffy was aiding and acting somewhat as "interpreter" (448). Later on June 13th he saw George again when he came to Duffy's home around midnight (409). Morao said that "a friend of his had been arrested at the Kennedy Airport, with some cocaine", and asked Duffy if he would help Morao "get hold of a lawyer for him" (409). After telephoning a lawyer friend he obtained the name of a Frederick Cohen, but after unsuccessful attempts to reach him by phone, Morao wrote down that lawyer's name and the name and office number of the first lawyer and he left (409-10).

The next morning, June 14, 1973, Duffy picked Theresa Costa up at Stan Freeman's house around 11 to 11:30 to take her to Paterno's office to get a letter to go to immigration for postponement of the hearing (410-11). This testimony was contradicted by Duffy's grand jury testimony and the physical evidence (444-7). He got lost because George had given him the wrong number and street name and when he finally found the location, he "ran in, picked Theresa up" and left (411). He spoke to George then, but not about anything pertaining to this [criminal] action (414-5). Duffy testified in September 1973 that when he picked Theresa up that morning at Freeman's house, he did not see Freeman but saw Morao, Costa, the baby "and a young woman who I later found out was Rosalys Rudner" (414).

But when Duffy testified before the grand jury on July 20, 1973, he said that on the occasion when he and Theresa went to Paterno's office for the letter and then went to immigration for the postponement, Theresa came over to his house, not that he went to Freeman's to get her (446-7). The hotel evidence showed that on June 14th a call was made to Duffy from the Costa room at the Albert (444-5).

Duffy "got the chronolgy of all—a lot of these events fairly well scrambled for a while, because I didn't realize that I was supposed to remember all of this stuff. . . ." (412).

Duffy did accompany Theresa to immigration and the hearing was postponed until June 18th (415).

Later on June 14, 1973, Duffy met Morao at the offices of Lefcourt, Katz & Brennan, in which firm Frederick Cohen is a law partner (416, 410). At that time, Morao said, concerning the cocaine importation or the arrest of his friend at the airport: that he was "acquainted" with these "fellow Brazilians"; that "although he knew" there was a plan "to smuggle cocaine into the country, he did not have any personal or financial involvement in the thing"; and that as "a friend of theirs" he was "just privy to the gossip about it as it was going—as it was happening" (416).

On June 15th, Duffy again met George at the same lawyers' offices. They had all read the charges against Tombini and her "statement or confession" (417). Morao stated there "that he did not have any interest in the smuggling operation, in any financial or physical way, . . . just that these people were friends of his". Morao also said: "he was trying to raise money for them"; "they were in trouble"; "he was himself in no way a part of the operation" (418).

From George's conversations at the lawyers' offices Duffy learned that when the two ladies came into the airport one was supposed to have and the other was not to have cocaine (448).

On the evening of either June 15th or June 16th—Duffy was not sure at both grand jury and trial and believed it could have been either (449)—Morao came to Duffy's house alone between 8:00 and 10:00 P.M. and asked him to

"stash a chick" in his apartment, but Duffy refused (422, 423, 428-9). Although George did not say to Duffy that this girl had an "immigration problem", Morao did say that to a "lot of other people" at that time (452).

On June 16th, Duffy went to Freeman's house sometime between 12 noon and 2:00 P.M. (429) and stayed for about two hours (452). Only George was up when he arrived—Theresa being out with the baby and Freeman waking and coming downstairs later (429). Duffy believes Rosalys Rudner was there—that she was the person who came down to the kitchen and went back upstairs at one point—but he didn't speak to her (429-30). He saw a bag there, with some clothes, but it was not the "Rudner" suitcases, Exhibits 36 and 37 (429-31; cf. 453-4).

While Duffy was at Freeman's on June 16th, he made a phone call to a friend in Vermont (431) on behalf of George and said something about "going fishing" (454). Duffy had a conversation with George about going across the Vermont border (455). He knew Morao wanted to "get the chick out of the country" (455).

Duffy's testimony made it clear that Freeman was not participating in Morao's talk with Duffy, since "close to 90% of the time" Freeman was on the telephone on his own business (454).

At one time during the afternoon of June 16th, Morao or Duffy asked Freeman if he had any maps of the Vermont area and Freeman tossed them a plastic bag with a whole lot of maps which included one of New England (456).

Duffy did not see Freeman after June 16, 1973 (456).

On June 18, 1973, Theresa came to Duffy's house and from there they went to Paterno's office where Duffy left

her for purposes of the immigration hearing (431-2). He then went to Stan Freeman's house—around 1:00 o'clock in the afternoon—with a box of disposable diapers (432). Duffy saw George Morao and Rosalys Rudner there, but Stan Freeman was not there (433). After he left the house he did not see Morao or Rudner again (434).

Sometime after, Duffy received a post-card from Morao from Lisbon, Portugal (434).

Morao was a photographer (434, 439).

Duffy did not recognize the bags (Government's Exhibits 43 and 44) belonging to George and Theresa (464).

Duffy did not know Mr. Patero, the immigration lawyer, before the events in question and was not the one who called and obtained him (447-8).

By stipulation on the defense case, Duffy "testified" that during all the conversations at the lawyers' office on June 14 and 15 during the time George Morao was discussing his knowledge of the events of this case, there was never any mention by Morao or by anyone else of Freeman's name or of anybody that would fit Freeman's description (799).

JOHN SPENCER DAVIS, JR., a 23 year old resident of Washington, D.C., had known Kim Ornitz about 4½ years socially and as a fellow musician. He met Freeman for the first time June 18, 1973 (463-5).

On Friday, June 15th, he stayed over in New York at Kim's home (465-6). He had not seen him in about a year (516). He told Ornitz then that there was a good chance he would be coming back through New York and would like to see him for dinner then, but there were no arrangements made for Monday, June 18th (516).

On June 18th, he called Ornitz from Connecticut at 12:09 P.M. (466) * and arranged to meet at his apartment around 4:00 P.M. to take him out to dinner (467). He took the 1:00 P.M. train and arrived there—270 Riverside Drive—about 3:45 or 4:00 P.M. (467, 517). No one else was present (467). They talked about going to dinner; Davis mentioned a Japanese restaurant; and Kim suggested meeting Wanda [Kim's girl friend] near Times Square to go to a good Japanese restaurant which was also near where she worked (468, 517). Kim left the room to make a phone call and said he called Wanda to make arrangements to meet for dinner (468). Around 4:20 or 4:30 P.M., Ornitz and Davis arrived in the Times Square area by subway (469). On the way to the restaurant Kim suggested that they stop in to see Freeman at his club and that "we might be able to get a blow of coke" (469). Kim also said he wanted to show Davis the layout of the club (519). At the Hotel Diplomat they found the Club (Les Jardins) closed, and Ornitz suggested heading for the restaurant; but upstairs Kim saw Freeman at the counter of the coffee shop and Davis was then introduced to him (471, 520). After a conversation about the club, Freeman asked to speak to Ornitz alone (472). Shortly after Freeman, Ornitz and Davis had a short conversation in the lobby of the hotel (473). Freeman said "there is this chick who is hot and she is a cocaine smuggler and her bags are at the Hotel Paramount, which is four blocks away" (473). When Davis asked "how can anybody smuggle coke these days", Freeman replied that "she is a photography student and has a lot of equipment and somehow worked it out, or words to that effect" (473-4). Freeman said he would arrange for the bags to be picked up that day. He said the bags belonged to Rosalys Rudner, Room 1815, Para-

* Davis testified to 12:30 or 12:45, but telephone bill shows 12:09 (767).

mount Hotel, and the bill was \$54.27 (474). Freeman said he had "arranged for a girl to pick them up" but if Davis could do it, it would be great and he would "get something out of it" (474, 523). When Davis asked if there was any coke in the bags, Freeman said "just a dash, maybe as much as five grams" (475). Freeman said he did not know if there was cocaine but he thought there "might" be 3 to 5 grams (511-2). Freeman said he was doing a favor for someone; that the bags were to be given to the friend; that there might be some coke in the bags and if there were, they could share it (512-3).

When Freeman first spoke to Davis he declined, but when Freeman broached the subject again, outside the hotel, Davis asked "what is in it for me" (475). When Freeman said he was not sure whether Davis would get "\$100* and get high", or "one gram of cocaine and \$50, or a gram, or just \$50", Davis agreed (475). Freeman reiterated the information necessary to pick up and pay for the bags and gave Davis three \$20 bills (476). Freeman indicated the bags "may be watched" and said if Davis were arrested he should not mention Freeman "because of the people I know and a thing like this they can follow up, my friends and me, and they can find Rosalys Rudner and we are about ready to get her out of town" (476). Freeman had a "number of times" said "the hotel might be watched, he didn't think so, but he didn't know" (513). Freeman told him that if he was arrested he was to say he met a man in the Hotel Diplomat, that he needed money and that the man offered him \$100 to pick up the suitcases (496).

Ornitz walked with Davis towards the hotel and they discussed the possibility of getting a little more than a gram (476-7).

* Minutes read "\$400." Counsel believes this is an error and that the testimony was "\$100."

Davis testified to the events at the hotel where he identified himself by license and in writing, paid for the bags, obtained a receipt and left with the bags (477-8); to the details of his arrest on the street (479); to his agreement to bring and his bringing the bags to Freeman at the Diplomat (479-80); and to his conversation with Freeman as to whether there was any "heat" (480).

A tape of Davis' telephone conversation with Ornitz on June 19, 1973 was introduced (489).

When Davis was first arrested on June 18th he was advised it was for importation of cocaine and Agent Levine told him there were two kilos of cocaine in the bags he had picked up at the Paramount (491). On June 18 and 19, Davis was led to believe by the agents that there were two kilos in those bags; that he could "take the weight for the whole rap for the two keys of coke"; and that the sentence could be to three counts of fifteen years apiece (491-2, 494, 496, 503, 529). The agents drew weapons when he was arrested and Davis was frightened (493). They did not believe his cover story (497). They said that he, Davis, was "obviously the man they were looking for who had the information about the chick, and that I better speak up, baby, or—you know, or else". Davis said "it was terrifying" (497). He then told the agents that he had just come in from Colorado and met Freeman through Davis' friend Ornitz; and that Freeman gave him \$60 to pick up the bags (497-8). He persuaded the agents to let him take the bags to Freeman (498). But he did not tell the agents that Freeman told him there might be some coke, about three grams, in the bags (498-9).

When Davis phoned Ornitz on June 19th (the taped conversation) he said certain things that were lies because he wanted to cooperate with the government and was frightened for his future as a result of this case (514-5).

Davis could not recall whether, when he was at AUSA Fried's office with his attorney on June 21st (505-6) and was being questioned, he was asked "Well, did something like this happen" or "Don't you remember something like that" (514). But throughout Davis' testimony at the grand jury AUSA Fried did ask him "questions in which he put in the information that he expected from the answer" and Davis just had to answer "yes" (508).

Davis is known as "Jock", identifies himself as "Jock Davis" and does not identify himself on the phone as "John Davis" (509). He did not call the Paramount on June 18 (509).

Ornitz had not said anything to Davis indicating any prior knowledge of the existence of the bags (527).

MARK ETRA, a 24 year old Brooklyn resident, had recently pled guilty to conspiracy to import three pounds of cocaine into the United States (538-9). He expected that his cooperation in this case "will be noted" in his sentencing (548); and that the judge would take it into consideration and lessen his sentence (578). He had spoken to Agent Levine and AUSA Fried to this effect (578). When he first spoke to the agents he was aware that they were very anxious to get information about Freeman, but he was not at first sure of his facts (583).

Etra first met Stanton Freeman in September of 1971 at Freeman's home in Greenwich Village. Freeman wished to sell Etra audio equipment (540-2). Etra brought cocaine and they used it (542). Etra was then importing cocaine (542) and he may have offered to obtain cocaine for Freeman (580). They discussed kilo quantities, price (547) and the possibilities of delivering large quantities of cocaine on a "fairly regular basis" to Freeman, but "there was nothing definite" (543). Within a week or so,

he brought a one-gram sample of cocaine to Freeman (545). Freeman "looked at it, said he would try it and let me know" (546). They discussed further the possibility of procuring cocaine and "it was left at that" (546). No cocaine transaction was ever consummated (582).

He recalled no other meetings with Freeman (572). He did not recognize photographs of other co-defendants in this case (573). From his experience in the narcotics world, he knew that many people talked about buying cocaine, about quantities and prices, but it would be no more than talk (580). In the course of such speculation, people would get samples, but it was like getting a free blow of cocaine and nothing would come of it (581).

JAY SILVESTRO, Special Agent with the U.S. Drug Enforcement Administration since July 1, 1973, identified Stan Freeman and Kim Ornitz (590-1).

On June 18, sometime after 2:00 P.M., Silvestro participated in the arrest of John Spencer Davis after he emerged from the Paramount Hotel with the suitcases and was walking towards the Broadway-Times Square area (592-6). Silvestro had initially noticed Ornitz standing on the street, leaning against the building; and then, when Davis was arrested, glimpsed someone he thought was Ornitz going around the corner (595-6).

Silvestro was then directed to go to the Hotel Diplomat and await the arrival of Mr. Davis with the luggage. Sometime later Davis arrived, went to a doorway at the back of the lobby, knocked at the door, stuck his head in and said something for a few minutes, went over to the desk clerk's office, put the bags there, sat down and waited (597).

Silvestro had no prior knowledge of Mr. Freeman (631). He first met Freeman at the Hotel Diplomat that day when

Levine identified himself and asked to speak to him (598). Freeman agreed, but asked them to wait; and proceeded to conduct some business in the restaurant for a while with a florist (598). Afterwards, upstairs in Mr. Freeman's office, Freeman was advised of his constitutional rights and told that he was a suspect in a cocaine smuggling case (598). Freeman made various statements in response to questioning by Agent Levine, including denials that he had seen Davis except when he had just put his head in the door, that he knew Rosalys Rudner, that he knew any Brazilians, and that he knew anyone who lived in the Albert Hotel (600-2). When told by Levine that they were conducting a smuggling investigation, Freeman said he would assist in anyway he could, but that he could not help (602). Freeman denied having seen the Rudner bags or Davis, but admitted knowing Ornitz. He said he had not seen him that day or for a while and then said he had seen him for a short time that afternoon (602-3).

Shortly afterwards, at the Diplomat's coffee shop, Levine explained that if Freeman knew the whereabouts of Rudner he should tell them then because they only wanted the girl; that they were primarily interested in locating her and not in involving anyone else (603, 630-1).

Silvestro had no knowledge of a warrant having been obtained for the arrest of Rosalys Rudner (634).

Silvestro next saw Freeman after his arrest, when Freeman was being questioned by Levine at Varick Street (604). Levine reiterated much of what he asked Freeman at the Diplomat the day before. Freeman again denied any knowledge of the bags or of Davis; but then said that if he could speak to his lawyer "I am sure I can explain this whole thing" (606). William London, Esq. arrived; had a

discussion with Freeman; ask that the U.S. Attorney be called; and then had a discussion with AUSA Fried (607-8).

In the interim, while London and Fried were not present, Freeman stated to Levine "that he had gotten into this mess because he was doing a friend a favor and that he could explain the whole thing" (608). But after Mr. London returned from his discussion with Fried, the meeting was terminated and Freeman taken to the Federal House of Detention (608).

During Mr. Levine's interview of Freeman that night, before the attorney arrived, Freeman advised that the friend he was speaking about was George Simon who was also called George Morao (632-3). According to Silvestro, this was possibly the first time the agents learned George's full name (631-3). Freeman had been shown photographs of Rudner on June 18th at the Hotel Diplomat and denied recognizing the person; and was again shown those photographs on the evening of June 19th (609-10). When Levine showed Freeman a travel folder bearing the full name of Theresa Costa written on it (a document taken from Freeman's briefcase) Freeman stated that "it was someone that he had called a lawyer for, for an immigration hearing, and not someone that he knew" (611-2).

One of the versions Freeman told that evening was that a George Simon whom he knew casually had asked him to send someone to pick up the bags and that Mr. Simon was going to come back to the hotel to get them later on (612).

On August 16, 1973, Mr. Silvestro again had occasion to speak with Freeman. This conversation took place during a conference of approximately three hours length at the office of AUSA Fried at which the assistant and Freeman's

attorneys (Myron Beldock and Kathleen Wresien) were present (612-3, 639-40). The court overruled defense counsel's objection to the admission of Silvestro's testimony concerning this conference on the ground that the statements were exculpatory and not incriminatory (613-15). The court stated that the only "value" of the evidence would be if the government proved that the "exculpatory statement is false" (614). The assistant also contended that the testimony would contain "one admission" (615).

The Silvestro testimony concerning the August 16th meeting, direct and cross, covers over 100 pages (616-721; 765-6). The defendant and his counsel had come to the government's office "representing that [they] wanted to tell everything Mr. Freeman knew about this incident, in the hopes that [they] could persuade the government that it was a mistaken indictment" (698). On the day before, August 15th, both defense counsel had had a similarly lengthy conference about the same subject matter with AUSA Fried. At that time defense counsel turned over to Mr. Fried numerous papers containing various information about George Morao and Theresa Costa (680, 686-7; Defendant's Exhibit E—Inventory).

A lengthy analysis of Silvestro's testimony as to what Freeman allegedly said on August 16th is not deemed necessary or appropriate. The accuracy and reliability of the testimony is very questionable since Silvestro testified solely from memory concerning this unusually detailed and long conference. No transcript was made and Silvestro made no notes at all (616). The government elected to pick and choose selective aspects from the entire conference which presumably suited its purposes (612-28). Defense counsel attempted to elicit the entire conversation, but this effort was frustrated by two factors: the court's strong objections

that such a procedure was improper (644-7, 694, 707-11, 774-6);* and by the extent to which Silvestro did not recall or only partially recalled many of Freeman's statements.

In addition, the judge made two very strong comments which seriously undermined defense efforts to bring out the entire conversation; and indicated that the issues were already largely prejudged. Thus, when counsel contended that one of his purposes in bringing out the entire conversation was to show the extent to which government efforts, subsequent to the conference, were able to verify some of the things that were said, the court commented (645):

"The Court: "So what? Are you trying to tell me that because he told the truth in some respects that I should believe that when he made *exculpatory statements that are obviously false* that I should weigh that in the light of the statements that he made that turned out to be true?" (Emphasis added)

Later, the court again used the phrase "since we are talking about exculpatory statements later shown to be false"

* It is respectfully submitted that the court was in error and that the law is as counsel contended: that once the government elicits portions of a defendant's statements, counsel has a right to elicit the entire statement and to cross-examine concerning same.

See *People v. Whitmore*, 27 A.D. 2d 939, 940 (2d Dept., 1967); *People v. Leyra*, 1 N.Y. 2d 199, 202 (1956); *People v. Miller*, 247 A.D. 489, 493 (4th Dept., 1936); *People v. Batten*, 40 A.D. 2d 549, 334 N.Y.S. 2d 546, 549 (2d Dept. 1972), aff'd 31 N.Y. 2d 737 (1972); *People ex rel. Perkins v. Moss*, 187 N.Y. 410, 428 (1907); *People v. Gallo*, 12 N.Y. 2d 12, 15-16 (1962); *People v. La Belle*, 18 N.Y. 2d 405, 410-411 (1966); and see *Richardson on Evidence* [9th ed.], Sect. 346, p. 333; 7 *Wigmore Evidence* [3rd ed.], Sect. 2113, p. 523. See also *People v. Phonville*, 22 A.D. 2d 814, 815 (2nd Dept., 1964); *People v. Ramistella*, 306 N.Y. 379 (1954); *People v. Barca*, 9 A.D. 2d 920 (2nd Dept., 1959); *People v. Sabella*, 24 A.D. 2d 885 (2nd Dept., 1965).

(668). However, later in cross-examination, as counsel continued to elicit various exculpatory statements, the court, objecting to receiving Freeman's statements through Silvestro without cross-examination, said (694):

"I am telling you that *I am paying no attention to this defendant's statements as given on August 16th to this witness.*" (Emphasis added)

In summary, the Silvestro testimony regarding the August 16th conference involved Freeman's denial of his involvement in the conspiracy, and his explanation of the entire relationship with George Morao and the events and surrounding circumstances of June 1973. In the course of this explanation, Freeman disclosed many significant facts of which the government had absolutely no previous knowledge and no other source, e.g., that it was Freeman who, at Morao's request, went to the Hotel Albert and paid the Costa bill and picked up their luggage; that when Rosalys Rudner was at Freeman's house on June 16th he obtained a barber to cut her hair; that when the agents came to the Hotel Diplomat on June 18, Freeman called George at his home and said one word—"Split." Freeman's disclosures included much information helpful in tracing Morao and Costa and much obviously candid and painfully embarrassing information about himself—all in an attempt to make amends for his initial misstatements and mistakes when speaking to the agents. In view of the court's above-indicated rulings and in view of the fact that Freeman ultimately testified regarding what happened, we think it only necessary here to set forth several portions of Silvestro's testimony which were not specifically covered by Freeman's testimony.

Freeman said he had known George Morao for some time and that he did not know Morao to be a smuggler of cocaine (626).

"He [Freeman] said, however, that in the past, primarily for business reasons, he had purchased small amounts of cocaine from Mr. Morao and had himself sold or transacted small amounts of cocaine as merely a business accommodation in the line of work, in the music and nightclub industry, and some of this cocaine was cocaine that he had gotten from Mr. Morao" (626).

Freeman stated that "from his own knowledge he had no idea how the [five pounds of] cocaine was brought in" (628).

MICHAEL LEVINE, Justice Department, Drug Enforcement Administration, had been a Federal agent for eight years (50, 723-4)*.

On June 15, Levine learned that Rosalys Rudner had checked into Room 1815 of the Paramount Hotel on June 14 and left her bags there. Levine placed the hotel under surveillance (89-90). On June 18, the hotel placed Rudner's bags in the storage area (74). Levine went to the hotel, intending, with management's permission, to examine their contents, but he never did (93). [When Levine got to the hotel, he was told by Mr. Steel, that somebody had called and spoken to Mr. Duarte, the room clerk, about coming to pick up the suitcase (96).] He later spoke to Duarte on that same day (98-9). Before June 18, Levine had never heard Stan Freeman's name (92).

About three to four hours later, John Spencer Davis arrived [identified himself], paid Rudner's hotel bill, took the bags, and walked down 46th Street towards Broadway

* Levine's testimony in the pre-trial hearings was incorporated by reference into the trial record with the specific exception of hearsay testimony concerning what Duarte and Davis allegedly said (729-32). The analysis above indicates such hearsay by brackets.

(77-8). The agents followed Davis and when he started crossing Broadway, Levine arrested Davis, telling him it was "for conspiracy to smuggle narcotics" (78, 102).

[After the arrest, Davis gave a story to Levine about the bags which account Levine did not believe]. Levine made no search of the bags at that time, but placed them in the trunk of the government vehicle (103). They were later taken out at the Hotel Diplomat (103-4).

[Davis told them, after his arrest, that Kim Ornitz had suggested that he go and see Stan Freeman (105); that Freeman said "they had the girl ready to get out of town" (106); that Davis never heard of Freeman before that day (107); that Davis had just come in from out of the state at about 3:00 or 3:30 that afternoon (107-8); and that Freeman had sent him to pick up the bags and gave him money for the bags (110).]

An attempt was made by Davis to deliver the bags to Freeman (110). Levine observed Freeman and Davis together, but could not hear the conversation (52). Davis spoke to Freeman for about 20 to 30 seconds (110).

[Davis told Levine that Freeman said to leave the suitcases where they were (52-3).] Freeman left his office with two others, pointed at the suitcases, and walked out of sight. [Levine was told by Davis that Mr. Freeman may have been warned about the arrest by Ornitz (53).] After this, Levine first approached Freeman asking to speak to him. Freeman asked if Levine minded going upstairs or waiting a few minutes. Then they went upstairs (113-4).

Levine then spoke to Freeman with other agents and John Davis present, in the rear office of the lobby of the hotel. Mr. Freeman was read his constitutional rights and stated he understood and had nothing to hide (54-5).

On being confronted with Davis and the allegation that Freeman sent Davis for the bags, Freeman said he had never seen Davis before; that he knew no one at the Albert Hotel; that he knew no Brazilians. On being shown photographs of Rosalys Rudner, Marilene Tombini, Francisco Rudge and Hermano Albuquerque, Freeman stated that he had never seen any of them before (55-9).

Levine and Agent Silvestro then asked Freeman to join them for coffee, and told him if he were afraid or doing someone a favor, that they were interested in the girl and would forget about him (59). Levine recalls telling Freeman that this was a narcotics smuggling case, though he had no notes of the conversation with which to refresh his recollection (119-20). Levine had destroyed all of his handwritten notes (82-4, 120). Levine told Freeman to call him if any information became available. That was the end of their conversation (60).

Later that evening, when Davis was not present, Levine searched the bags for the first time (78-9, 140). This was about 7:00 to 7:30 P.M. (104). He found a small quantity of cocaine, cocoa leaves, numerous photographs, a case for a telephoto lens and a lens (79).

When he opened the bags, Levine had no information that they contained cocaine or any drugs (100-1, 108). Levine had obtained a statement from Marilene Tombini, but there was no reference to Rosalys Rudner's bags (90-2).

On June 19th, at approximately 5:00 P.M., Levine arrested Freeman on West 4th Street, pursuant to an arrest warrant. Levine had prepared the affidavit and sworn to it June 19, 1973 (60-1, 123). Levine frisked Freeman for weapons and found none (129). He believes he showed the arrest warrant (129). Freeman was carrying his suitcase

which Levine then took out of his hand (129-30). Freeman was read his rights, indicated he understood them and was taken to Varick Street for processing. No questions were asked in the car (61-2). At Varick Street his property was "gone through and inventoried" (63). Levine opened the bag and went "through the bag, item by item" (131). No inventory was produced. Asked if any inventory was made, Levine said "the only thing I have is a receipt for the items that were returned to Mrs. Freeman, and items that are left themselves" (132).

In Freeman's briefcase Levine found a folded card with the name "Terezinha Costa" (66). When shown to Freeman he said "if you let me call my lawyer, I can explain this card" (67). He continued talking, saying "this whole thing could be explained, he just did somebody a favor" (68, 138).

After consulting his attorney, Freeman stated that "the way he got involved in this was, he received a phone call from someone by the name of George, whom he knew and whom he knew was a Brazilian, asking him to refer him, meaning George, to an immigration lawyer for Terezinha Costa, who, to Mr. Freeman's knowledge, was the woman George was living with" (70). Freeman stated George's last name was "Simon"; that he did not have a phone number for him; that he did not know where he lived; that they were not good friends; and that he had last spoken to George several months before (70). He again stated he had never seen the fugitive Rosalys Rudner before (70-1).

To Levine's knowledge, the first investigation into the Theresa Costa immigration problems revealed that there was no such person on file at immigration (138-9). Later, David Duffy stated that he had referred George to attorney Paterno (139).

On being shown an envelope with George's name and a phone number written on it, he stated that it referred to George Simon and that it was an old phone number. On being shown the postmark on the envelope of May 19, 1973, Freeman stated he was confused. The phone number was that of the Albert Hotel. Freeman made no other statements (71).

Mr. Levine then testified to a conversation with Mr. Ornitz held September 13, 1973 (just before trial) at the office of AUSA Fried in the presence of both the assistant and Ornitz's lawyer, Patrick Wall, Esq. (732). Although this testimony was extensive (732-64), it is not analyzed here because it was either admitted solely against Mr. Ornitz or on the theory that he was a member of the conspiracy (735-47, 748-9), and none of it could be used against Freeman once the judge dismissed the Ornitz charges at the end of the government's case.

JACK BRADFORD STRANGE, 22 years old, was employed at Les Jardins, Hotel Diplomat (576). Approximatey mid-June 1973 Freeman called his room at the Times Square Hotel, the call having been taken by a woman (577-8). He and the woman then went to the Hotel Diplomat, arriving about 5 to 5:30 P.M. (578-9). Strange saw Freeman right after he arrived, at which time Freeman said to the woman: "Forget about it; it's already been taken care of, don't worry about it" (579-80).

NINA RAO CAMERON, an attorney and presently District Counsel of the U.S. Immigration and Nationalization Service, knew Freeman since 1966 when she represented him in filing a petition for musicians who worked at Freeman's club, the Electric Circus (793-4).

On a Friday night in early June, 1973, Freeman called to obtain a recommendation of an immigration lawyer for

a Brazilian lady whose case had been marked for deferred inspection because of a conflict between a tourist visa and an application for a permanent visa (794-5). At her request he called her office Monday morning. She then recommended immigration attorney Patero and gave Freeman his telephone number for his friend to call (796).

NICHOLAS PATERO'S testimony, introduced by stipulation, was that he handled the immigration matter for Theresa Costa; that their first contact was on June 13, 1973 when Costa and David Duffy came to his office; that his letter of June 13th requesting an adjournment of the hearing was picked up by someone in his absence on June 14th; that the hearing was adjourned to June 18th, on which date he did not see Duffy but did meet with Costa and represented her at the deferred inspection hearing which satisfactorily resolved the conflict between the visitor's visa and permanent visa application; that he did not know who referred the client; and that he had no communication with either Mrs. Cameron or Mr. Freeman (797-9).

KIM ORNITZ, 22 years old, was in the music business: record production; music publishing; an artist who sings commercials and makes records and plays numerous instruments (800). He studied classical music for fourteen years. He was conducting business through his own company as a performing artist and a producer (800). He was personally rehearsing with a piano player for night club work.

Mr. Ornitz had been convicted of a crime, having pled guilty in April 1973 to a misdemeanor of possession of a dangerous drug (801).

He first met Freeman in early 1971 (before leaving for California for about six or seven months) and resumed his relationship on returning that fall (801-2). At the time

Ornitz first met the defendant, Freeman was a very influential and well known man in the music industry and Ornitz, a striving 19 year old, was interested in cultivating the relationship (802-3). But as it developed the aspect of friendship became more significant, although they did do business over the years—primarily with Ornitz producing the record product and Freeman marketing it (803-4). For example, they finally consummated a deal in late spring 1973 for an artist named Jessica Harper with RCA records after working on it over a year (804).

During the period of April, May and June of 1973 Ornitz did not see Freeman as often as he would have liked since the latter was involved in constructing and rebuilding a nightclub which took up a good deal of his time and Ornitz was rehearsing with a piano player and handling business that Freeman could not attend to because of his involvement in the club and the required late hours (805-6). However they had been in telephone contact and also seen each other from time to time during that period (806).

During the week beginning Monday, June 10, 1973 Ornitz first saw Freeman on June 13th at Les Jardins when he came down to substitute for the sound technician who had not showed up (806-8). Ornitz stayed there from approximately 4:30 to 8:00 P.M. when he went home to change for the opening of the club that night. He only stayed a short while at the opening (808). Ornitz knew the George in question in this case but never knew his last name (808-9). He had last seen him sometime in April at a session Ornitz was producing (809).

After the club's opening on June 13th Ornitz did not see Freeman again until Monday, June 18th, although they had spoken on the phone about the club in the interim (809-10). He had last seen Jock Davis on the previous Friday the 15th; and before that not for about a year. Earlier in

their relationship Kim and Jock had struggled together in a rock and roll band for about three years, but one of the reasons Kim left the group was Jock's behavior (810-11). Essentially, Kim described Jock as a big talker and blow hard who had no sense of reality or responsibility (811). When Kim again saw Jock on June 15, 1973, it was the same old Jock—speaking of building a half million dollar recording studio and of having three quarters of the backers when Kim knew it was just “another pipe dream” (812). As differentiated from the well kempt witness who appeared in the court a few days earlier, the Jock Davis who was on the scene in June of 1973 “looked like he crawled out from under a rock”, with a three year length mustache, long hair, straggly dungarees, used boots and denim jacket (824-5). On June 15th after going out to dinner with Kim's girlfriend Wanda, Jock stayed over at Kim's house and the next day went to Connecticut, leaving with the comment that he “may be coming in Monday, and I'll give you a call” (812-3). Since Jock was very bad with appointments, Kim did not count on him calling on Monday (813). But Jock did call from New Haven on June 18th and told Kim he was taking the train which arrived around 2:30 P.M. (814). Jock came to Kim's house about 3:30-3:45 P.M. and they sat around talking in his apartment until, after a call to Kim's girlfriend Wanda, arrangements were made to meet for dinner at a Japanese restaurant on 46th Street near Fifth Avenue (814-6). In the late part of the afternoon they took the subway to 42nd Street and Times Square and walked towards the restaurant (816-7). As they walked on 46th Street they passed the Hotel Diplomat and Kim suggested that they go to see the club that Stan Freeman was working on, but when they went in the doors to the club were locked (817-8). Upstairs in the coffee shop Kim saw Stan Freeman and introduced Jock (818). Afterwards Stan had a discussion with Kim in the hotel lobby for

about three to five minutes and then, at Kim's suggestion, spoke to Jock (818-9). Kim was about five or six feet away during the Freeman-Davis conversation. Freeman explained that some girl's boyfriend had been arrested and was in trouble; that she was hysterical and needed her suitcases with all of her clothes; that Stan wanted someone to pick them up but could not because he was tied up in the club; and that he had somebody else ready so it did not really matter whether Jock wanted to do it or not (820). Stan had said to Jock that there might be approximately three to five grams of cocaine in the bags and this greatly interested Jock who wanted some of the cocaine (821). Stan told Jock the room number and the name of the hotel (822-3). He said "There's a million and one possibilities, God forbid, that the bags are watched" (822) and repeated God forbid a number of times.

Although Davis was curious and wanted to know the "story behind the bags", Freeman did not tell him any more basically than that the bags could be picked up if Davis went over there (822-3). Freeman did tell Davis that if he got into any trouble he should say that some man had approached him on the street and offered him \$100.00 to pick up the two suitcases and bring them back to the Hotel Diplomat (823).

Freeman did not say anything to Davis about the girl involved with the bags being a cocaine smuggler (823); and Ornitz protested that if he had heard anything like that he would have grabbed Davis and run in view of the fact that he, Ornitz, had just been sentenced and was looking to stay away from trouble (823-4). Nor did Mr. Freeman say anything then about getting the girl out of town that night; or about the girl being a photographer and managing to smuggle cocaine in her equipment (824).

Jock volunteered to pick up the suitcases (820). Kim chose to accompany Jock because he was concerned (considering the possibility that the bags might be watched) that Jock not get into trouble and he wanted to be available to help him (825, 836). When he saw Jock merge from the Hotel he thought he saw someone following him in a car. Kim went back to Mr. Freeman at the Hotel Diplomat and advised him, after which both Freeman and Ornitz walked to 43rd Street and Broadway looking for Davis (826-7). Kim then returned momentarily to the Diplomat and proceeded to pick up his girl friend Wanda at work and to go home (827).

There had been a discussion between Jock and Kim before they went to Freeman's night club in which Kim, responding to Jock's question as to where he can "get a blow" said that "If Stan has one I'm sure he will give me one" (829-30). Although Jock may have had it in his mind, Ornitz did not go to Freeman's club that day to get a blow of cocaine but rather to show him the club that his friend had been involved in and working on (829-30). Ornitz had no knowledge of Davis ever speaking to Freeman before that day. But Ornitz did tell Davis, before they went to the club, that "Stan sometimes had cocaine" (831).

Ornitz was sure that he could overhear and did overhear the entire conversation between Freeman and Davis at the Diplomat Hotel on June 18th (831-2).

Ornitz was extensively examined by both government and defense counsel concerning any transactions which he had had in the past with Freeman concerning cocaine (837-854).

Mr. Ornitz explained that the only circumstances in which he paid Freeman for cocaine was when he was paying for a cost of a share and not when Freeman was selling to him at a profit (849-50, 841-2, 848-9).

On two separate occasions during the Ornitz testimony the court specifically ruled that it was only going to consider testimony of cocaine transactions involving Freeman that fell within six months preceding June 13 and that the Court was not interested in any other evidence of that nature (852, 850). In analyzing the entire Ornitz testimony it is important to note that there was no evidence specified to fall within the sixth month period delineated by the court although there was some meager evidence which involved events described as occurring a year to a year and a half or so prior to June 1973 in one instance and a year to a year and a half prior to April, 1973 in all other instances.

During the six months preceding June 13, 1973, there were occasions when Ornitz purchased cocaine, by "accommodation" or otherwise, from persons other than Mr. Freeman (850). There were "quite a few" times during Mr. Ornitz's relationship with Mr. Freeman when Freeman did not have cocaine (851-2). Specifically during the six months prior to June 13, 1973, there were times when Ornitz and Freeman were together and were not using cocaine (852). They were together on business and social occasions "quite frequently"—"anywhere from three to five days a week" (852). There were times when Ornitz had cocaine and he shared it with Freeman and then Freeman paid Ornitz for the cost (852-3).

Mr. Ornitz denied telling Mr. Levine that Freeman had sold him an ounce of cocaine for approximately \$1200 to \$1300 (853). During the conversation with Mr. Levine there was only one reference to an incident involving an ounce of cocaine (853-4, 845-6). This incident took place over a year to a year and a half previously (842, 854).

This was not an incident of Freeman making a sale to Ornitz, but involved a favor for one Lee Brown, who came

to Ornitz through a mutual friend (Jock Davis). (845-6). Ornitz did see George turn the one ounce of coke over to Mr. Freeman on that occasion (842). But Freeman and Ornitz were selling the ounce of cocaine to this friend of *Jock's* ~~Freeman's~~ *Jacques* at no profit (845).

Ornitz had seen George three or four or five times at Freeman's house before April 1973 (837). Ornitz and Freeman had both purchased cocaine from or through George (838). Although Freeman made the purchases, Ornitz and Freeman shared the finances and the cocaine (838, 839, 841-2, 848-9). The total quantity of cocaine purchased from George was "maybe two or three spoons, a quarter ounce", over a period of a year and a half prior to April 1973 (840). A spoon cost \$25; a quarter ounce cost about \$250 or \$300 (841). The purchases occurred at Mr. Freeman's house (840). Freeman "never obtained cocaine" but people would come to his house "possibly trying to sell him cocaine" and one of them was George (847).

On analysis, the testimony established and did not establish the following: no cocaine involvement since April 1973; no specific evidence involving cocaine within the six months prior to June 1973; evidence that on three to five occasions within a year to a year and a half prior to April 1973, Ornitz had paid Freeman for cocaine they were sharing, at cost; and evidence that a year to a year and a half ago Ornitz and Freeman had obtained an ounce of cocaine for sale to a friend of a friend of Ornitz' at cost. The evidence shows that Ornitz knew the ounce had been obtained from George and thought that the quantities which he and Freeman obtained on the three to five other occasions came from George. As to the latter instances, the most that Freeman was involved in with George for both himself and Ornitz, was several spoonfuls, or a quarter of an ounce total, plus the ounce for Ornitz' acquaintance Lee Brown. It is

curious that in view of the limited nature of Ornitz' evidence—and he was the only source of proof concerning Freeman's alleged purchases from Morao where any detail was filled in—that the court made the following clearly erroneous finding in reviewing the case, after both sides had rested, and in the course of instructions to counsel as to what he required by way of briefs in lieu of summation (1021) :

“There is no question in my mind that this defendant used cocaine, bought cocaine from George Morao in quantities which *the evidence indicates were up to four ounces, which is about a quarter of a kilo.*”
(Emphasis added)

By the court's own rulings, this finding of fact made absolutely no sense as well as being completely erroneous. For the court had ruled that it would only consider evidence of transactions within the six months prior to June 13, 1973 and there was no specific evidence of that nature. Moreover, the total that Ornitz testified to over a period of a year and a half or so prior to that date, was 1¼ ounces.

JOY ROBBINS, a 23 year old resident of Atlanta, Georgia, had known Freeman since approximately July, 1972, after which a relationship developed between them (876). They started to live together, continued through the spring of 1973, when they were living on Perry Street, and continued thereafter (857). She had met George, who she knew as George Simon, at Freeman's house; also knew Theresa; and knew that they had a relationship between them and a baby (857). There was a social relationship between George and Theresa on one hand and Joy and Stan on the other, involving visits to each others homes, concerts, and dining at home and out (858). Joy and Stan

had dined at the other couple's apartment after the Deodato concert in the spring of 1973 (858-9). After that occasion and until June of 1973 she did not see Theresa who she understood to be leaving for South America to take her baby to see her parents and only saw George a couple of times (859-60). She understood that George was working on a loft he was turning into an apartment for himself and Theresa (860).

Prior to June of 1973 Freeman was working putting together a nightclub at the Hotel Diplomat (860). In early June Joy left for Atlanta for a week and returned to New York City on Friday night, June 8th (860-1). Freeman picked her up at the airport. Right after returning home, George called Stan (861-2). During their short talk she was going up and down stairs with suitcases but she did recall, she thought, that Freeman then wrote down Theresa's full name (862-3). Joy saw George and Theresa over that weekend, during the daytime, when they arrived at Perry Street with the baby and a present (bracelet) for Joy from the South America trip; and when the three went to the corner to have soft drinks and beers (863-4). During this time Freeman was at work (864).

On Sunday night George visited Stan and Joy at home (864-5). George brought Stan a present from South America (a polished stone paper weight) and they all sat around talking about the club that Stan was putting together (865-6). As the conversation developed into a discussion of opening night (Wednesday, June 13th) and the fact that Stan was going to have a sort of buffet for the customers, "George was talking about what a great cook he was, how he could make great shishkabob"; and a plan developed to have George arrange and prepare the shishkabob for the club (865-6). George and Stan agreed to meet the next day and check the price of shishkabob (866).

The visit that night was for about an hour or so. Stan had not seen George in a long time. They were talking and laughing, and discussed a haircut George had had (866).

Joy knew the nature of the charges in the case on trial (866). During the Sunday night meeting on June 10, 1973, there was no discussion between George and Stan about a shipment of cocaine or importing cocaine (866-7).

On Monday afternoon, George called after Stan had left for the Hotel Diplomat and wanted to know where Stan was because they were supposed to go check out the shishkabob; and Joy told him that Stan was at the Hotel (867). Stan called later and she told him that George had called (867).

On Tuesday night, June 12th, one day before the opening of Les Jardins, Joy unexpectedly left New York City for Atlanta after having a fight with Stan (867-8). The reason she got upset with Stan was that he was working constantly for two or three weeks or so before she left for Atlanta in the first week of June and she thought things would be different when she came back, but they turned out to be just as pressured (868, 876-8), with Stan working inordinate hours which left her lonely and dejected. She stayed in Atlanta after leaving on June 12th and was still there during the events that led to Mr. Freeman's arrest (870-3).

During the times that she was in New York City on June 8th through 10th and saw George and/or Theresa, she learned they were staying in a hotel; and both during the telephone conversation that Stan had with George on Friday and during the discussion with George on Sunday night Stan and/or George discussed the fact that it would be preferable if George and Theresa left the hotel and stayed with Joy and Stan—as she said “because it would be only natural, you know, they were friends, you know” (869, 872, 873).

ROBERT M. HELLER, an attorney at law admitted to practice in New York State since 1965 and employed as house counsellor and vice president for a corporation, testified as a character witness (879). He had also been a stock broker and at one time was involved in the entertainment field (880). Approximately four or five years earlier he had met Mr. Freeman when Heller was managing a musical group which Freeman hired at the time he was running the Electric Circus (880). Thereafter a social relationship developed between Heller and Freeman and their wives and they had stayed in contact over the years (881).

Heller testified to the fact that Freeman had a good reputation for truthfulness; and that he had never heard anything of a derogatory nature that might affect Freeman's reputation as a law abiding citizen and a man of integrity (881-2).

ROBERT W. COX, a 36 year old attorney admitted to practice in New York State approximately three to four years earlier, was then employed as a partner of the international law firm of Baker & McKenzie (907). Upon graduation from law school he had been employed in Washington with the United States Securities and Exchange Commission in the office of general counsel for three years, until 1965; and from 1965 to 1967 had served as executive legal assistant to the Securities Commissioner, Byron Woodside (907). He had originally been admitted as a lawyer in Indiana in 1962 (907-8). Cox knew Freeman from the fall of 1968 when his law firm was representing the Electric Circus in its corporate activities and Cox participated in efforts for private placement of securities (908). In the fall of 1968 at least through Chapter 11 proceedings in 1969-1970, Cox had contact with Freeman, an officer of the Electric Circus, as well as other members of the organization and people associated with it, anywhere from four to

five times a week and sometimes after working hours (908). Since 1970 Cox had seen Freeman less frequently but he had met and visited with him on a number of occasions (908-9).

Cox had been a guest in Freeman's apartment on 62nd Street on a number of occasions and also on several occasions at his apartment in the Village (909).

Cox stated that Freeman's reputation for truthfulness and honesty was "very high, excellent" (909); and that Freeman's reputation as a lawful and law abiding person was "excellent" (910).

STANTON J. FREEMAN, 39 years old, was presently residing at Atlanta, Georgia. He lived in West Greenwich Village, Manhattan, at the time the charges were brought in this case (888). He was married; had two children, ages 15 and 13; and is a Canadian citizen and a permanent resident of the United States. He had never been convicted of a crime (885).

Mr. Freeman graduated from Olivet University in January of 1957. He worked in various business activities, one being Claretone, a Canadian Electronics firm; then went into the music business; and finally, in 1966 opened his own multi-media night club, the Electric Circus (886-7).

Freeman had known Kim Ornitz since 1971, in both a business and social relationship (888). Prior to his arrest and imprisonment in this case, he had never heard of Francisco Rudge, Marilene Tombini or Hermano Albuquerque (891).

He first met George Morao in the fall or later part of 1971. He met Theresa Costa a short time afterwards (891-2). Their social relationship developed some four, five or six months after they first met (988). They had gone out

for dinner; had each been to the other's home for dinner; and had gone to at least two, and perhaps three, concerts together (989). Their meetings were not regular. George frequently visited alone; as did Theresa (989-90).

Their relationship was not related to the music business. George was a film maker and photographer. His last work was for some settlement house (927). Freeman knew that George had money and knew that Theresa had money and that Theresa came from a wealthy family in Brazil, her father being President of the Banco de Brazil (986-94).

Freeman had done prior favors for George and Theresa (994), though George had never requested any favor that was out of the ordinary (995). Freeman did not consider the favors he did for George between June 15 and June 18, 1973, as "special" at the time as: "at that point and time you know, I didn't think this was major—I had no idea as to the size of the favor it turned out to be. I had no idea. It wasn't a major thing for me, you know, to ask a friend, if you find somebody to go to pick up some luggage for me . . . That's not that heavy favor to ask of someone. Only in retrospect when you see it was about a \$50,000 favor, at least" (996).

Freeman knew that Morao was a person who dealt in cocaine (930-1). Asked if he had any knowledge of any sort concerning the plan to import cocaine involved in this case, Freeman answered "none whatsoever." Asked if he was "participating in 1973 or involved in any way in a plan to import cocaine" Freeman answered "No" (986).

In May and June of 1973, Freeman was putting together two night clubs in the Hotel Diplomat (889). The week preceding June 13, he was working at least 18 hours a day (921-2).

On June 8, Morao phoned to say that he had returned from the airport (893). George asked whether Stan could recommend an attorney to represent Theresa in an immigration problem. Stan called Nina Rao Cameron who within a few days recommended to Stan the attorney Nicholas Patero (894-7). Freeman spoke to Morao on the phone twice that evening (1005-6).

On June 10, George Morao brought a gift for Freeman from South America to Freeman's home. They discussed the possibility of Morao's supplying the shishkabob for Freeman's opening night (915-7). On June 11, Freeman reached George by phone by calling a person he now knows as David Duffy, but then only knew as David. He and George discussed the brochettes and prices and arranged to meet the owner of the club the next day (917-9). Stan had gotten George's number by calling Theresa at the Hotel Albert (919).

On January 12, George came to the club and met the manager, but it was determined that it was too late to prepare brochettes for the opening night of June 13 (920-1).

Freeman saw Kim Ornitz on June 13, the opening night of the clubs, as he had helped Freeman with the sound system at the clubs (922). Freeman is not positive whether it was June 14, or June 15, he next saw George and Theresa and their baby (925; 933). To the best of Freeman's recollection it was June 15 (925). At Freeman's behest they agreed to stay at his house. Theresa asked Stan to pick up something at their loft and he did so (926).

Freeman explained that though he was very busy, "it was after opening, Friday, two days after the opening. I wasn't going to work until sometime later that evening. I didn't have to be too early and it was a pleasure for me to go out on my motorcycle, for I was going out anyway." (928). The

contents of the box which Freeman picked up for Theresa were later turned over to the government (929).

When Freeman returned to his home, he gave George a set of keys to his house and went to work (931).

In the early A.M. of June 16, Freeman called his home to make sure that everything was all right. At that time, Freeman agreed that a girlfriend of Theresa's could stay overnight (932-3).

When Freeman returned home that evening, George unchained the door to let him in, and Freeman could see two bodies laying under sheets in the house (934-6). When Freeman awoke on Saturday, on June 16th, he was introduced to Theresa's friend "Josie". He now knows her as Rosalys Rudner (934-8).

George told Freeman that "Josie was in a pretty bad state, that her boyfriend had been busted, arrested and that she was extraordinarily upset. So that was for Josie and that was the reason that Josie had come over the night before to stay with them" (939-40). Josie did not speak English so there was no conversation between Freeman and Josie (940).

Later that afternoon at approximately 1:00 P.M., at Theresa's request, Freeman picked up her bags at the Hotel Albert, paid the bill and brought the luggage back to his house (941-2). Theresa had wanted to pick up her bags; George was out; and Freeman went so she did not have to go out in the rain with the baby (941).

Later that afternoon George's friend David Duffy was at Freeman's. Freeman was on the telephone but heard George and David discussing Vermont and how easy it was to get across the Vermont border into Canada. They asked Freeman for a map of New England and he gave them a package of maps.

At this point, Freeman: "didn't want to know. I didn't want to have anything to do with their conversation nor get involved with it. I was taking care of my business and they were taking care of whatever they had to take care of" (943).

David made a call to a friend in Vermont (943).

On that day, Freeman asked George if he had gotten legal counsel for Josie's boyfriend, and he said that he had retained the firm of "Lefcourt, Katz, Brennan and something" (945-6.) Freeman did not speak to any member of the firm about the case, or aid George in their retention (1017-19).

Later that day Freeman brought in a barber to cut Josie's hair at either George's or Theresa's request so "she would feel better" (946-7).

That evening when Freeman left for work, he dropped Josie and George at 4th Street and Second Avenue at George's request. He never saw Rosalys Rudner again (947).

On Sunday, June 17, George, Theresa, their baby, and Freeman went to Grandview to visit Freeman's family. On the way back, George mentioned that Josie wanted her clothing (948-9).

George and Theresa stayed at his home that night. On the morning of June 18, Theresa went to an immigration hearing (949).

George mentioned again that Josie was very much concerned about her clothing (950). When Freeman asked why George did not just get the bags, George said "they might be looking for Josie or they might have traced Josie, or through her boyfriend, or this or whatever" (951). George, asserting his linguistic difficulties, asked Freeman

to call the Hotel Paramount and see if the bags were there. Freeman did and told the hotel he would arrange to have someone pick up the bags. Freeman suggested that George have someone pick up the bags and George said he knew no one. Then Freeman, as he was leaving for the club, said that he would have someone at the club pick up the bags if he could. He asked if there was anything aside from the clothing in the bags. George said that there might be "3 grams of coke, maybe as much as 5". In reply to Freeman's question, just before he left, George said he was only concerned about the clothes and didn't care whether the coke came back with the bags (950-3).

Freeman first tried to arrange for Brad Strange to pick up the bags (953-4.) Then Kim Ornitz stopped in with Jock Davis. Freeman explained George's problem to Kim. He would not have Kim pick up the bags because he had been busted and "there was no way in the world he could do it for me just in the event that there was a problem" (954-6).

Kim suggested that they ask Jock and they did. Kim told Jock that "there are some bags at a hotel that belong to some girl that she wants. There might be a small quantity of coke in the bags. And if he would be interested in going to the Paramount Hotel and retrieving the bags, the coke that would be in the bags would be shared . . ." (956-7).

Freeman explained that there was a problem. He believed that he told Davis that "The bags belong to a girl whose boyfriend got busted. She is very distraught. Se is very messed up right now. And she is not in a position to pick up the bags herself. If you want to pick up the bags, fine. Whatever coke is in there, split it up . . . There is a possibility, a very outside possibility that they might be watched for one or two reasons, because when she didn't

come back to the hotel . . . it is conceivable that the hotel could have gone through the bags and found coke in the bags, and therefore, alerted the police to watch, or just on the outside possibility that in dealing with the problem that her boyfriend was in, had tracked down the bags" (957-8).

Then Freeman gave Davis a cover story to tell the police if he was stopped (958).

Before Jock left, Freeman asked if he was sure he wanted to do it—that he had someone else who could do it. Jock said "I would love to get it" (958-9).

Freeman did not recall giving Jock the name of the lady in question. Freeman then went back to work (959). About twenty minutes later, Kim returned and said that he thought someone was watching Jock leave the hotel. Freeman told Kim to go home and went back to work. One-half hour later, Jock was at his door and Freeman told him to "split" as Freeman believed Jock was being followed (960-1). Freeman then continued with his own work (961-2).

On his way through the hotel lobby, Freeman noticed what he assumed to be agents in the lobby. Freeman went to the roof with the owner of the club and a florist and from the roof called his house. George answered and Freeman said "split" (962-3). He did not know if Rosalys Rudner was at his house or that he was warning her (1017).

Freeman then returned to work and was confronted by Agent Levine, his associates and Jock (963). Freeman excused himself for a minute, finished his work and then spoke to Levine. Levine asked if he had ever seen Jock and Freeman denied knowing him. Levine said that Jock had told him that Freeman sent him over to the Paramount Hotel for the bags and told Jock to bring them back. Freeman

said "Well, what's the problem . . . What's in the bags?" (964).

Levine told Freeman that either there was "a number of kis of coke in the bags, or there were ten kis of coke in the bags" (964). Freeman explained his reaction in this way: "This, to say the least, put me into a total state of shock, the possibility that there were ten ki of coke in the—in Josie's bags, which threw me for an entire loop. I hardly even know what I said at that point in time—" (964).*

At this time Freeman did not know Josie was involved in anything; knew her boyfriend had been busted; but didn't know why (964-5).

Freeman explained his thinking: "There was two—two things running through my head: One was, if it is something this heavy and I'm going to have to end up back down at my house with these Agents, I certainly don't want to find George at my house, because obviously George might be involved in something that I don't know anything about, but it's heavy enough to bring these Agents back with the bags" (966). The court continued to question Freeman and determined that the "split" phone call was made before Agent Levine told Freeman there were two kilos or ten kilos in the bag. The court then questioned: "At that point, you didn't know whether it was heavy or not, did you?" Freeman responded: "When I saw—Wait, I saw—When I saw the Agents sitting in the lobby of the hotel, when Kim had already told me that Jock was being followed—I mean, why should he be followed? I mean, if it isn't heavy, there is no reason for the Agents to be in my—You know" (966-7). Freeman stated that he knew at this point that George's friend has been busted at the Albert Hotel (967; 987).

* Levine's aggressive behavior with Freeman is completely supported by his threats and misstatements of fact to Jock Davis on his initial interrogation (491-2, 494, 496, 503, 529).

Freeman then went through the conversation with Levine at the Hotel Diplomat. He substantially admitted his inaccurate denials as previously testified to on the government's case (972-7). He explained his denials at the time as "my head just said that that was what I should say, that I didn't want to be involved, have anything to do with it. I was scared to death, I didn't want to do anything" (974).

Later on that evening at the Hotel Diplomat, Freeman received a telephone call from Theresa. In a cryptic message, she asked if she could go to the house to pick up her records. Freeman replied that she could not. Freeman stated: "I thought my phones were tapped, my head is tapped and everything is tapped, and I did not want Theresa anywhere near my house, nor George, nor anyone else" (978). This was the last time that Freeman spoke to Theresa (978).

On Tuesday afternoon, June 19, Freeman was arrested. Freeman told Levine repeatedly that "until my lawyer met us, wherever the hell it was that we were going, I had nothing whatsoever to say" (980).

When they reached Varick Street, where Freeman was to be processed for the arrest, Levine threatened Freeman with "Freeman, you'll get 35 years for this if it's the last thing that I do, and I'll see that it happens to you" (980).

Freeman states that he answered questions put to him with "When my attorney gets here I trust he'll clear this entire matter up and save you a great deal of time on chasing down deadend roads" (983). Freeman did explain Theresa's name on a piece of paper by stating that she had an immigration problem and that he had called a friend to arrange an attorney for her immigration situation. He said that he had George's number because George was the one who called and was a friend of his (985).

Freeman did not think picking up the bags was an unusual request because "this is his girlfriend. This isn't the man that we're talking about. He didn't ask me to pick up the man's bag" (997).

Asked if Freeman recalled the meeting with Mark Etra, he replied "I recall his story." When asked if he recalled it as Etra testified, Freeman said "Give or take, you know, 50 per cent" (1001).

POINT I

There was insufficient competent evidence as a matter of law to show that Stanton Freeman was a knowing participant in the charged conspiracy or was guilty of the substantive charges.

The court found the circumstantial evidence proved that Stanton Freeman entered the conspiracy at the commencement of its term; that the conspiracy continued until the time of his arrest on June 19, 1973; that Freeman knew Morao was to receive the cocaine from Rudge, Tombini and Rudner on or about June 13, and that Morao had agreed to sell Freeman all or part of that importation (1030; 1035).

The facts show that Stanton Freeman had met George Morao in September of 1971; that he associated with George the week before the importation; that George Morao met with Francisco Rudge, the importer; that Freeman did acts after June 13, 1973 to help George Morao; that Freeman had made accomodation sales of cocaine in the past; that none of such acts were proven to have occurred within six months prior to June 13 (the period stated by the court at 852 to be the only period to be considered); that the nature of these acts, insofar as any were specified, was that over a period of about one and a half years prior to April 1973,

Freeman had made accommodation "sales" to Kim Ornitz, at cost, which totaled at most $\frac{1}{4}$ ounce of cocaine; that this cocaine had been obtained from Morao; and that about a year to a year and a half before June 1973, Freeman and Ornitz had obtained an ounce of cocaine from Morao which they sold as an accommodation, at cost, to an acquaintance of Ornitz.

The theory of the government was that there was a "chain" conspiracy (535) involving Rudge, Rudner and Tombini as importers; George Morao as the distributor and crucial link in the conspiracy; and Stanton Freeman as a cocaine dealer. As there is no proof of any relationship between Freeman and the three importers before June 13, 1973, Freeman's guilt necessarily depends on the scope of his agreement with Morao and that of any agreement between Morao and the importers. Yet the proof showed, at most, that Freeman had bought and resold small quantities of cocaine from Morao, both infrequently and at times remote from the conspiracy charged; and failed to establish any conspiracy between Morao and the importers. The court, on this evidence, should have dismissed at the end of the government's case, and should have directed an acquittal of Stanton Freeman at the end of the entire case. There was insufficient circumstantial evidence to allow a rational conclusion that Freeman was a knowing participant in the June 13 conspiracy to import and distribute cocaine.

The indictment charged a single conspiracy between May 15 and June 18, 1973. However, the facts showed a conspiracy which terminated on June 13, 1973. The proof specifically showed an agreement between Rudge, Rudner and Tombini limited to one purchase of two kilos of cocaine, with the motive of obtaining money for a movie to be made by Rudge and in which Tombini was to have a part. The case is a classic example of a single conspiracy with only

one object—the importation and distribution of five pounds of cocaine. As such a single conspiracy, the object of the conspiracy was completely thwarted and the conspiracy terminated on June 13, 1973, with the seizure of the cocaine at Kennedy Airport.

The duration of a conspiracy depends upon the scope of the agreement entered into by the parties. When the crucial aim of the conspiracy is accomplished or frustrated, the conspiracy generally ends. *Krulewitch v. United States*, 336 U.S. 440 (1949) ; *Grunewald v. United States*, 353 U.S. 440 (1957) ; *Bollenbach v. United States*, 326 U.S. 607 (1946) ; *United States v. Hickey*, 360 F. 2d 127 at 141 (7th Cir. 1966). There is no longer the "continuity of action to produce the unlawful result" charged in the substantive crime which is needed to continue the conspiracy. *Fiswick v. United States*, 329 U.S. 211 at 216 (1946).

There are of course, cases which have held that some conspiracies continue after the substantive crime has been committed. In *McDonald v. United States*, 89 F.2d 128 (8th Cir. 1937), a kidnapping conspiracy was held to continue after the substantive act was completed, as the court determined that an object of the conspiracy was illicit gain, and until this was realized, the conspiracy continued. A party who conspired with the major conspirator after the kidnapping to exchange marked bills for unmarked bills could therefore be part of the conspiracy as he joined before the termination. And in *United States v. Perrone*, 161 F. Supp. 252 (S.D.N.Y., 1958), a conspiracy to transport stolen goods was found to continue past their delivery because the money had not yet been exchanged for the goods and the conspiracy therefore had not ended.

However, those cases do not apply to the present one as no illicit gain nor profit could be achieved once the cocaine

was seized, and no object to the conspiracy remained to be achieved. There was simply no opportunity to continue the conspiracy to import and distribute the five pounds of cocaine once it had been seized on the night of June 13, 1973.

Any evidence in this case involving Stanton Freeman with any of the conspirators related only to acts after June 13, 1973. They can best be characterized—if to be considered evidence of any unlawful act—as tending to show an attempt to conceal Rosalys Rudner and George Morao. However, no initial agreement to retain secrecy can be shown or implied by mere acts of concealment *after* the achievement of the unlawful end. As stated in *Grunewald v. United States*, 353 U.S. 391, 402 (1957), “acts of covering up even though done in the context of a mutually understood need for secrecy cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.” Therefore any act on Freeman’s part to conceal the conspiracy after June 13, 1973 would not of itself give rise to an inference of a continuing conspiracy, and thereby would not permit an inference of involvement in the major conspiracy. Only were there evidence that the conspirators originally agreed to conceal the conspiracy after its completion, or evidence from which such an agreement could be inferred, could the conspiracy be found to have continued past June 13, 1973. *United States v. Hickey, supra* at 141.

JUNE 13 The evidence reveals no such agreement to conceal. Of course there is no evidence whatsoever of contact or knowledge between Rudge/Rudner/Tombini and Freeman, before the trial. As stated, the government relied on a “chain-link” conspiracy theory to prove Freeman’s guilt by inference from his association with George Morao. Therefore, before considering the Morao-Freeman “proof”, one must

find sufficient evidence regarding Morao and the principal conspirators.

But there is a complete failure in the government's case to prove either a conspiracy between George Morao and Rudge, Tombini, and Rudner to conceal any activity; or any showing of any agreement between these parties at all. The earliest evidence the government has offered, through Rudge, antedates the opening date stated for the formation of the conspiracy: May 15, 1973. Although Rudge said his trip to South America, when he learned about cocaine, took place in the spring of 1973, he was apparently talking about the Brazilian spring since he specifically stated that the conversation he had with Morao on his return occurred around the end of February 1973 (383-386).^{*} But what is most significant about the Rudge-Morao conversation at that time, is that they did not come to an agreement for the importation and distribution of cocaine. The conspiracy cannot be made out of Rudge's passive statement concerning the ease with which cocaine could be bought in Boliva and Morao's passive response concerning the ease with which it could be sold in New York, even when we add that Rudge asked Morao about the possibility of selling it and Morao responded that it would not be any problem (386). This testimony simply failed to establish an agreement between the parties, as further evidenced by Rudge's statement that he was not thinking about importing cocaine into the United States at that time and that he did not then indicate to Morao anything concerning when he might, if at all, import cocaine (306-307).

The next conversation testified to by Rudge is apparently the one referred to as occurring on the opening date

^{*} The Court apparently agreed with this analysis of the sequence of events (1027-8).

of May 15, 1973 stated in the indictment (387). The entire testimony dealt with Rudge's discussion with Rudner concerning the importation of cocaine and Rudge's decision that he might do so at the beginning of June (387-388). Although Morao was present during this conversation, according to Rudge's testimony Morao said not a single word. Rudge said that the entire agreement was reached between him and Rudner without Morao's participation in any way.**

Rudge's testimony to the effect that after that meeting he and Miss Rudner started planning for the importation and that he went to London to meet with Tombini at the end of May in no way involved Morao (388-390). When Rudge returned to the United States, either May 30 or May 31, he did not meet with Morao who was not in New York (390-391). Subsequent conversations concerning the importation of cocaine took place among Rudner, Rudge, and Tombini at the beginning of June and again did not involve Morao (391). Indeed, according to Agent Silvestro the governments' investigation had determined that prior to June 8, 1973, Morao was out of the country for "perhaps in excess of a month" (438). There was no evidence through Rudge or otherwise to the effect that Morao had anything to do with the ongoing plans and acts of the conspiracy up until June 13, 1973 when its purpose was frustrated by the seizure of the two kilos of cocaine at the airport and the arrest of Tombini (see 391-398).

** The Court stated in its Decision (1028):

"This was prior to Morao's trip to Brazil. It is not clear whether Morao left for Brazil to help Rudge (who insists this was his only experience in the importation of cocaine) procure the cocaine in Bolivia."

This is indicative of the court's reaching for evidence upon which to pin its conclusion that Morao entered into a conspiracy with Rudge and Rudner.

Obviously there is nothing in this testimony to establish that there was a conspiracy between Morao and the others either to conceal a narcotics scheme or to import and distribute cocaine. All of the government's evidence concerning Morao comes down to little more than association with the prime conspirators, and knowledge of the existence and goals of the conspiracy. This does not of itself make Morao a co-conspirator. *United States v. Cianchetti*, 315 F. 2d 584 at 588 (2d Cir. 1963). In that case, the defendant admitted that he had known the prime conspirators for thirty years; that they had offered him large quantities of heroin; and that he had discussed the problems of distribution and of securing prompt and full payment with them, but had made no fixed agreement to cooperate in the venture. The court felt that:

"there must be something more than '[m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy * * *.' [citation omitted] This 'something more' is generally described as a 'stake in the venture'. '[I]n prosecutions for conspiracy * * * [the defendant's] attitude towards the forbidden undertaking must be more positive. * * * he must in some sense promote their venture himself, make it his own, have a stake in its outcome.'" [Citations omitted] *United States v. Cianchetti*, *supra* at 588.

See also *United States v. Terrell*, 474 Fed. 2d 872, 875 (2d Cir. 1973) (presence at the scene and guilty knowledge sufficient only when coupled with active participation in the narcotics operation); *United States v. Fantuzzi*, 463 F. 2d 683 (2d Cir. 1972), especially at 690; *United States v. Agueci*, 310 F. 2d 817 (2d Cir. 1962); *United States v. Steele*, 469 F. 2d 165 (10th Cir. 1972); *United States v.*

Thomas, 468 F. 2d 422 (10th Cir. 1972), *cert. den.* 410 U.S. 935.

George Morao in no way participated in the plan of Rudge, Tombini and Rudner in a manner that indicated that he was seeking by his actions to make it succeed. In fact, his only activities in connection with these people occurred after the plan had already been thwarted. And there is no evidence indicating that any agreement between Rudner, Rudge and Tombini specifically alluded to concealment of the conspiracy.

Just as there was no information as to Marao's adoption of the conspiracy as of June 13, 1973, there was a complete failure of proof as to Freeman's involvement as of that date. The three prime conspirators had no knowledge of Freeman by name or otherwise and he had no knowledge of them. There is no evidence which could in any way connect Freeman with any of the actions of the conspirators in conceiving and furthering the plan to import and distribute cocaine. The only person in the overall picture with whom Freeman had any communication during the pendency of the conspiracy was George Morao; and all of the evidence (testimony of Robbins, Duffy, Cameron, Patero and Freeman) established that during that period of time the relationship was social (visits and gifts and assistance in finding an immigration lawyer) and professional (shish-kebab plan for Les Jardins) and had absolutely nothing to do with cocaine. This association is simply no proof of any agreement between Freeman and Morao to conspire to import and distribute the cocaine in this case.

The combination of the failure of proof as to Freeman's involvement with the importers and the failure of proof as to Morao's agreement leads to the conclusion that Freeman was not part of this conspiracy. The government sought to rectify this paucity of evidence by introducing evidence of

the acts of Morao and Freeman after the termination of the conspiracy. However an analysis of the more pertinent actions after June 13, 1973 only tended to prove *at most* that Freeman helped Morao conceal Rudner; and does not infer back to knowledge of the conspiracy and any act of furtherance during its pendency. The evidence is irrelevant to proof of any knowing agreement to import and distribute cocaine.

Rudge testified that he had spoken to Morao late in the evening of June 13, 1973, after Rudge had sent Rudner to the Paramount Hotel (398). At that time, Rudge spoke to Morao at the Albert Hotel and told him that everything was confused, that there was some coke coming in but there was a possibility that the girl had been arrested, that he had sent Rudner to the Paramount Hotel and "that was it" (398-400). Rudge did not see Morao again (401)

This statement only verifies that Morao was not part of the conspiracy but in fact only learned of Rudge's actual plans after the cocaine had been seized.

David Duffy's testimony further established that Morao was not a participant in the conspiracy, but that the conspirators were fellow Brazilians and friends of his, that Morao had no financial or other interests in the importation of cocaine or the plans, that he was helping out in obtaining the lawyers for his friends, and that as an acquaintance he had been privy to the discussions concerning the plan to import cocaine as it was going on, but was in no way personally involved (416-418).

With no further proof on the subject, this evidence leads inevitably to the same conclusion reached above—that Morao's acts after June 13 were to help his friends. The only rational conclusion that can be reached is that not only was Morao not proven a part of this conspiracy, but that there is no evidence to begin to tie Freeman into it.

The acts of Stanton Freeman subsequent to the termination of the conspiracy on June 13, 1973 are in no way probative of his knowing participation in the conspiracy during its pendency. To infer back to Freeman's knowledge of the conspiracy, the court relies on Morao's and Rudner's presence at Freeman's home after the seizure of the five pounds of cocaine from his home; Freeman's phone call to Morao on June 18, advising Morao to "split"; and Freeman's attempt to get Rudner's bags at the Hotel Paramount.

The evidence concerning Freeman's attempt to secure the Rudner luggage again involves an act separate from the completed conspiracy. The 3.2 grams of cocaine actually found in the bags, although instrumental in Freeman's involvement on June 18th, have not been proven in any way to have any connection with either the conspiracy or the substantive counts. Not only is there no proof of a common source and some evidence to the contrary, the proof is that the importation scheme did not cover any other cocaine aside from the five pounds seized at the airport and that it was not part of the plan for Rudner to have any other cocaine among her belongings when she came into the country from South America.* Indeed, the court specifically ruled that 3.2 grams of cocaine had "nothing whatever to do with this case" (696).

The court also placed great emphasis on Freeman's conversation with John Spencer Davis in his attempt to get these bags. In this conversation, Freeman allegedly told Davis that he was interested in getting two bags owned by

* Even if possession of the 3.2 grams could be attributed to Freeman, the amount in question does not infer an intent to distribute and falls in the category of personal use. See, e.g., *U.S. v. Owens*, 344 F. Supp. 1355 (W.D. Texas, 1972); *U.S. v. Gonzales*, 442 F.2d 698, 709 (2d Cir. 1970); *Turner v. U.S.*, 396 U.S. 398, 422-424 (1970); *U.S. v. Mather*, 465 F.2d 1035, 1037-8 (5th Cir. 1972), *aff'd*, 475 F.2d 759.

a cocaine smuggler at the Paramount; offered Davis money and cocaine; and advised Davis that the girl's name was Rosalys Rudner, room 1815, Paramount Hotel. After Davis' arrest, and return to the hotel, Freeman refused to see him or acknowledge any interest in the bags. Freeman then placed the phone call to George and said "split".*

Davis' version of his conversation with Freeman is completely contradicted in both Freeman's and Ornitz' testimonies. However assuming Davis' testimony to be an accurate presentation of the conversation, the knowledge shown by Freeman of Rudner's situation is still knowledge expressed after the termination of the conspiracy. The conversation in no way indicated an involvement prior to June 13, 1973, and was not proof of Freeman's knowing and willful participation in the conspiracy.

The Court had no evidence from which to begin to infer more that the fact that Freeman sought to hide Rudner

* The "split" phone call was completely unknown to the government until voluntarily disclosed by Freeman and his counsel in August 1973 (676) when they came to the United States Attorney's Office to tell his story in full, correct his initial misstatements to the agents, and cooperate in giving information to trace Morao. Since Freeman was the sole source of this information, it is disturbing that the court's decision (1035) incorrectly states the related facts and circumstances. The statement in the text above reflects Freeman's testimony at trial p. 49, *supra*). Knowing there was trouble after Ornitz and Davis returned to the hotel and thinking he recognized agents in the lobby, he walked past the bags and went upstairs to place the call to George containing the one word "split". It was after this call that Agent Levine first approached Freeman and advised him of their business. Levine testified consistently with this sequence of events in that he said Freeman crossed the lobby, pointed to the bags, disappeared and was subsequently approached by the agents (53, 114). But the judge improperly placed the phone call after all the conversations at the hotel among Freeman and the agents (1035), thus improperly adopting the testimony of Agent Silvestro who related that version from his memory of what he thought Freeman had said at the August 16, 1973 conference (676, 716).

from the government and that he had some vague knowledge of the fact that there had been a conspiracy as of June 18, 1973. The Court sought to avoid this fact by making conclusions unsupported by the evidence. For example, on page seven of his decision, the Judge states that Freeman and Morao discussed the possibility of flight from the United States and taking refuge in Canada. He then states that on Saturday, June 16, Freeman, Morao and David Duffy discussed escape to Canada through Vermont. Both Freeman and Duffy—the only sources of information before the court—stated that Freeman did not partake in the conversations between Duffy and Morao about the route through Vermont to Canada. In fact, Duffy states that Freeman was on the phone 90% of the time on his own business.

The Court then sought to buttress its factless conclusion that Freeman was a knowing participant of the conspiracy by making findings that Freeman had a "cocaine business"; that Morao was his "regular source of supply"; that Freeman had a close relationship with Morao; and that Freeman met with Morao socially the week before June 13 (*Decision*, 1628-1029 pp. 2-3). From this it improperly infers that Freeman knew that Morao was to receive the cocaine on or about June 13, and that Morao agreed to sell Freeman all or part of the importation.

The government's direct case on Freeman's prior cocaine dealings rested on testimony from Mark Etra and Agent Silvestro.* Etra's testimony was that Freeman on one occa-

* The testimony of Agent Levine on the government's direct case as to statements made by Kim Ornitz of Freeman's prior dealings in cocaine were inadmissible against Freeman as hearsay. However, considering the paucity of information upon which Judge Mishler made his decision, it is at least a fair question whether he unconsciously relied upon this impermissible hearsay information of bad acts prior to the formation of the charged conspiracy in determining that there was a prima facie case against Freeman.

sion at a casual encounter in September 1971, at Etra's behest, discussed with Etra the possibility of getting large quantities of cocaine on a fairly regular basis; that Etra later delivered a one-gram sample to Freeman; and that nothing else happened (p. 20-1, *supra*). (This testimony is inadmissible—see Point III.) Agent Silvestro testified that Freeman had stated in an August 16, 1973 meeting that "in the past, primarily for business reasons, he had purchased small amounts of cocaine from Mr. Morao and had himself sold or transacted small amounts of cocaine as merely a business accommodation in the line of work, in the music and nightclub industry, and some of this cocaine was cocaine that he had gotten from Mr. Morao"; and that he did not know that Morao was a cocaine smuggler (626). The remainder of the government's evidence as to a relationship between Morao and Freeman before June 13, 1973 (Duffy, Agent Silvestro) was that they had met in September of 1971; had socialized and become friends since; and that on June 10 or 11, 1973, they discussed Morao making shish kebabs for the opening night of the club Freeman had conceived.

This was not *prima facie* evidence that Freeman was in the cocaine business; that Morao was his regular source of supply; or that Freeman had agreed with Morao to purchase cocaine from the importation of June 13, 1973. What is present is an admission that on occasion Freeman would buy small amounts of cocaine from Morao and others to sell to business associates as an accommodation; and the Etra testimony concerning a discussion about cocaine:

"Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it." *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938).

The scope of Freeman's dealings with Morao was the buying—for his own use or for business accommodations—of small amounts of cocaine from Morao. The dealings with Morao and Freeman were proven neither so frequent nor so large as to infer that Freeman was a continuing customer on whom Morao could rely to dispose of cocaine from any source Morao could find. *United States v. Borelli*, 336 F.2d 376 at 387 (2d Cir. 1964).*

Moreover, there is a complete deficiency of any evidence as to Morao's source for the cocaine which he sold Freeman before the present charged conspiracy. One cannot imply from a void in the evidence that the cocaine Morao sold was imported and that he was involved in importation; nor can one further imply that Freeman was part of any agreement with Morao which involved the importation of cocaine from any source, as Freeman's purchases of small amounts of cocaine do not yield the inference of knowledge of importation, *Turner v. United States*, 396 U.S. 398 (1970). There is therefore not even evidence that there was any continuing enterprise which involved importation and distribution of cocaine.

On Freeman's case, Kim Ornitz testified that he had bought small amounts of cocaine from Freeman (an approximate total of $\frac{1}{4}$ ounce obtained 3 to 5 times over a period of one and a half years before April, 1973) on an accommodation basis—that is, if Freeman had cocaine, Ornitz would take half and pay for its cost; that Ornitz also shared his cocaine with Freeman on the same basis; that Ornitz believed Morao was a source of cocaine for

* *Borelli* held, in part, that the defendant's purchases, frequent and of one to two kilogram quantities, were sufficient evidence to permit the threshold requirement of proof of a continuing conspiracy—that there was a likelihood that defendant was a continuing customer of the core drug supplier on whom the latter could rely to sell any drugs the supplier produced.

Freeman; and that on one occasion Ornitz had purchased cocaine from Morao directly. Ornitz also testified that he on one occasion a year to a year and a half before June 1973, solicited one ounce of cocaine from Freeman for a friend; that Freeman in turn sought out Morao; that Morao turned the cocaine over to Freeman in Ornitz's presence; and that they sold this cocaine to Ornitz's friend at cost.

This testimony does not alter the conclusion that there was no continuing conspiracy between Freeman and Morao. Ornitz' mere 3 to 5 purchases—or accommodations—from Freeman in a year and a half of a friendly and frequent relationship, the total being 1/4 ounce, only buttresses Freeman's admission of occasional small purchases and transfers of cocaine. These facts do not show any basis for the finding that Freeman and Morao were a central core in a conspiracy to import and distribute cocaine. If any regular or irregular course of conduct can be implied from the above, it certainly does not give rise to the inference that Freeman knew Morao's operations, or that Freeman had formed any understanding with Morao as to regular receipt of cocaine. If Morao did import and deal in cocaine regularly, Freeman could only be an outer and indifferent link to Morao's dealings—a buyer indifferent to, and unknowledgeable of, his source of supply. In such a case the chain conspiracy charged would take on the attributes of a spoke conspiracy, with the outer links not dependent on each other for operation. There are no facts in evidence to permit the inference that Freeman knew the operation was so large as for him to require the importers as a source, or that Rudge knew Morao would necessarily distribute the cocaine to other distributors. *United States v. Borelli*, 336 F.2d 376, 383-4 (2d Cir. 1964).

Freeman's cocaine transactions with Morao took place prior to the formation of the conspiracy charged in the indictment—a fact acknowledged by the government (538-539). They were not shown to continue into the period of Rudge's importation scheme. This buttresses the conclusion that the government's evidence—if it tended to show any conspiracy between Morao and Freeman—related to one separate from that charged in the indictment. If any continuing agreement between Freeman and Morao could be found to exist, it is one in which Freeman did not know Morao's source for cocaine, did not know whether it was imported,* and did not care. Any such agreement was not shown to exist into the term of the charged conspiracy; and if it did, the facts in evidence, would imply that the agreement had terminated.

Circumstantial evidence must supply a sufficient rational basis to infer guilt. *United States v. Brown*, 236 F. 2d 403 (2d Cir. 1956). As the evidence in this case does not permit the inference that Freeman was a co-conspirator of Rudge, Rudner and Tombini to import and distribute five pounds of cocaine, the court erred in not directing acquittal on the conspiracy count of the indictment. And as the government completely failed to prove any acts on Freeman's

* The Court glosses the lack of information as to Morao's prior sources of cocaine, and therefore Freeman's knowledge of those sources, in its decision, for it says, "During the period from on or about September 1971 to June 13, 1973, Freeman was unaware of the identity of the importer of the cocaine. Freeman, however, knew that the cocaine Morao sold him was purchased by Morao from the importer or that Morao himself imported the cocaine." But the only evidence on the government's case was Freeman's statement to Silvestro, elicited on direct, that "he did not know Morao to be a smuggler of cocaine" (626). The only additional evidence, on defendant's case, was Freeman's denial of knowledge of smuggling (986). As the amounts Freeman possessed from Morao were small, Freeman cannot be presumed to know they were imported. *Turner v. United States*, 396 U.S. 398 (1970).

part to further the conspiracy charged before June 13, 1973, the date of the substantive offense herein, the court erred in not directing a verdict of acquittal on the substantive counts of the indictment. *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

POINT II

Freeman's guilt was not proven beyond a reasonable doubt.

The above analysis of the facts in the Statement and in Point I shows that the government failed to prove Freeman's guilt beyond a reasonable doubt. The view expressed by the court that Freeman and Morao were engaged in a continuing conspiracy (1029-30) ; and the further inference that Freeman was a co-conspirator with Morao in this importation, are not reasonably derived from the facts. The evidence in this case does not approach the standard for a finding of guilt based on circumstantial proof—that is, that the court from the evidence could reasonably arrive at its verdict.

It is notable that the judge's written memorandum and findings of fact consistently decided all disputed evidentiary questions in favor of the government's versions and did not mention the contrary testimony or take note of significant evidence that seriously attacked the credibility and accuracy of the government witnesses.

Although Freeman stated that it was his best recollection that Morao did not arrive at his house until June 15 and that Rudner did not arrive until the A.M. hour of June 16, the judge accepted the Duffy testimony that he saw Morao and Rudner in Freeman's house on the morning of June 14 when he went there to take Theresa to immigra-

tion for the post-ponement. But Duffy was directly contradicted by his own Grand Jury testimony on July 20, 1973. In the Grand Jury he said that Theresa came to *his* house on June 14, 1973 before going to immigration for the postponement; not that he went to Freeman's to get her for that purpose (410-414; 446-447). The physical evidence (the Hotel Albert record) showed that Duffy received a phone call from the Theresa Costa room at the Albert on June 14, which strongly indicates Theresa was in fact then at the Albert Hotel and not at Freeman's home. As Duffy stated, his testimony was "fairly scrambled for a while because he didn't realize that he was supposed to remember all this stuff" . . . (442).

John Spencer Davis, originally a co-defendent, stated a version of his conversation with Freeman which was completely contradicted by Ornitz and the defendant. His entire testimony should have been carefully weighed against the proof that he reached his ultimate version of the facts only after he was seriously threatened and lied to by the agents who kept him misinformed for two days as to his possible culpability (the lie being Agent Levine's statement to Davis that there was two kilos of cocaine in the bags he was carrying) until after Davis had been questioned by the Assistant U.S. Attorney. Davis found the whole arrest and interrogation terrifying (497). Davis acknowledged that when he testified before the Grand Jury the content of his answers was placed in leading questions and all he did was give affirmative responses. Was this a credible witness whose testimony should be taken at face value? The judge's decision accepted each Davis word as if it were gospel and did not mention one of the various factors which should have been seriously weighed against the Davis "proof".

Etra, testifying to an event that happened two years before trial, was a convicted smuggler of cocaine who ex-

pected his testimony to result in a lessened sentence (578) and who was not at first sure of his facts (583).

And finally, Agents Levine and Silvestro testified from memory, as they had either taken no notes or, as Levine admitted, destroyed them prior to trial (616; 82-4; 120).

Moreover, the court's decision gave no credence or weight to Mr. Freeman's explanation of his association with Morao and his involvement in the circumstances. Stanton Freeman testified that he had known George Morao for two years. Freeman had established a social and friendly relationship with Morao, as verified by the testimony of Joy Robbins of the non-cocaine connected relationship that existed between George and Theresa on one hand and Stanton and Joy on the other (858-60). All evidence of the meetings with George preceding June 13, 1973, is that they discussed the possibility of George staying at Freeman's house (Robbins: 869, 872, 873); Theresa's immigration problem (Cameron; Robbins; Freeman; Duffy); and shish kekab for the opening night of the club (Robbins: 865-6; Duffy: 437-41; Freeman: 915-7). No cocaine was discussed in the weekend conversations (Robbins: 866-867), and there was no proof of any cocaine discussion any other time until the subject of the 3.2 grams was raised June 18th. Freeman's action of June 15, 1973 in letting Morao stay at his home was completely consistent with their friendship; as was complying with George's request to let Rosalys Rudner stay at his home. Any inference that he was specifically hiding this girl as Morao's co-conspirator is refuted by Duffy's statement that Morao asked both Duffy and others to "stash a chick" (422-3; 428-9). Freeman said Rudner left his house for good with Morao about 9:30 on Saturday night, June 16 (947). This is partially supported by Duffy who said that between 8 and 10 P.M. on June 15 or 16 George came to his home asking to "stash a chick" (449, 422-3, 428-9).

Freeman's decision to help George by getting Rudner's bags was initially a friendly gesture that he did not feel was "special" (996). The act of getting the bags was then enhanced by the knowledge of possibly 3 to 5 grams of cocaine to be contained therein—in getting the bags, Kim Ornitz, ^{Freeman, and Jack Davis} ~~and Jack Davis~~ were to share the cocaine (956-7; 512-3). All of this infers cocaine usage and possible moral obliquity. But it contradicts any inference that Freeman was a cocaine supplier with large amounts of cocaine at his disposal.

Weight must be given to Freeman's explanation and the support given it and Freeman throughout the defense case by Joy Robbins, Strange, Cameron, Patero, Ornitz, and character witnesses Heller and Cox. As stated in Point I *supra*, there was no evidence introduced in this case to associate either Morao or Freeman with the May 15-June 13 conspiracy as ^{participants} ~~participants~~. Freeman's knowledge after June 13 of the extent of this conspiracy could not make him a member of that conspiracy unless he had taken some affirmative action to support it during its pendency. And though his actions after June 13, 1973, were such as might lead to an inference that he knew Rudner was being hidden by Morao; and that on June 18, 1973, in not telling the agents of Rudner, he aided her to escape detention, this is perfectly consistent with Freeman's explanation that he was helping his friend, George. Freeman had learned that Rudner's boyfriend had been busted (939-940); he did not want to know more (943). When he had recognized the agents in the lobby of the Diplomat, after Ornitz had alerted him, he realized the attempt to obtain the Rudner luggage was "heavy" (966-7). The court recognized that he at this point believed that either Morao was in trouble, or that ~~he~~ himself might be in trouble (Sentence minutes, 17). That he denied knowledge of Rudner, Brazilians,

Davis, etc., when questioned by the agents, is perfectly consistent with the fact that he feared he had involved himself in an attempt to obtain the 2 to 10 kilos of cocaine which Agent Levine told Freeman to be in the Rudner luggage (964). Freeman testified to his extreme panic and shock at the time.

That Freeman might know at this time the nature of Morao's operation is a conclusion beyond the scope of this record, as no Morao importation and distribution operation was shown. The evidence certainly could not rationally lead one, beyond reasonable doubt, to conclude that Freeman was part of the narcotics importation and distribution conspiracy charged.

The fact that the question of Mr. Freeman's guilt was a very close question for Chief Judge Mishler, was unexpectedly illuminated by the Judge himself in the course of colloquy at the time of sentencing.

When defense counsel was objecting to the unsubstantiated basis of certain comments that had been introduced into the probation report by the agents (to the effect that they believed Freeman to be more knowledgeable of cocaine activities in New York than he had stated to the authorities; Sentence Minutes 1/4/74 at 10-11), the following occurred (*Id*; 11-12):

"The Court: I disregard these generalities. But on specifics, in spite of his denial of the activities of Mr. Mauro—

Mr. Beldock: Mauro. Excuse me for correcting you.

The Court: I forgot. He had a strange spelling of his name. It is hard for me to believe that this

was merely a series of coincidences or fortuitous circumstances.

I think in some treatises writers say that evidence is really a number of coincidences that brings it to the level of evidence. There were too many here for me to come to any conclusion other than one, that he knew that Mr. Mauro was in the cocaine business; two, that Mr. Freeman used cocaine and distributed cocaine.

As a matter of fact, he and Mr. Ornitz conceded that. When Mr. Ornitz wanted a blow of cocaine, where did he tell Jaques Davis to go? Down to Mr. Freeman's place. When Mr. Freeman says he wanted to retrieve the valises he felt that there was some cocaine in it. He didn't realize that this was part of a conspiracy, but there was some cocaine, and what did he promise Davis? A blow. This kind of familiarity with what is going on in New York cannot be overlooked.

I say, this is on the admissions of Freeman and on the statements of his witness Ornitz. Ornitz came very close to coming into this conspiracy, but I just felt the government did not have enough and I dismissed. But the close relationship between this young man, who was in the music business, and Mr. Freeman, who offered opportunities for those in the business, was very significant."

Even more significant were the court's comments in response to defense counsel's contention that there was "good reason to believe that Mr. Freeman made a very serious and clean breast of his activities and of his past to the government, areas that the government had absolutely no

way of obtaining that information but for what Mr. Freeman said" (Sentence Minutes, 16-17). The court responded (Id.; 17-18):

"The Court: I believe this, to the extent that he made a statement he told the truth. I don't know what he did not tell the government, and you and I will never know. But I am not basing my statement or sentence on what he did not say. I am saying on what he said, and what the evidence proved in this case, that is what I am basing it on. He knew Mr. Mauro, knew him well, knew his business. When he called and said "Split," he knew Mr. Mauro was in big trouble and was anxious to see him get out of the country. He was anxious to see him get out of the country either for Mr. Mauro's well-being or for his own.

I am assuming, as Mr. Freeman states, that as a friend he wanted Mr. Mauro out and there was no selfish interest in it. But I dispute Mr. Freeman's position that it was pure innocence and he did not realize the nature of Mr. Mauro's operation. That is where you and I differ.

You are a zealous advocate and you have been living with Mr. Freeman, so to speak, and I see it as the record, that's all."

Thus, the court endorsed the truthfulness of Freeman's statements to the government when he appeared with his counsel on August 16, 1973 at Fried's office and spoke in the presence of Agent Silvestro; and concluded, assuming such statement to have been truthful insofar as it went, that Freeman must nonetheless have been aware of the Morao "operation" and "business"; and that, considering

Freeman's other activities from June 14 through June 18, Freeman was a member of the conspiracy from its inception. This open and candid explanation by the court of the reasoning behind Freeman's conviction, throws a very clear light on the inadequacy of the government's case and the erroneous findings of fact and conclusions of law set forth in the judge's written memorandum of decision and in his rulings denying defense counsel's various motions to dismiss and/or for a directed verdict of acquittal and/or to set aside the verdict as being against the weight of the evidence and contrary to law.

The "coincidences" which the judge revealed that he relied on do not attain the level of competent evidence, as they require speculation and not reason. His misconceptions of the evidence were multifold (see Point I, *supra*). The "familiarity" the judge abhorred (Sentence minutes, 12) may breed contempt—it does not prove guilt. The speculation in which the judge indulged in finding Freeman guilty is not a rational basis from which he could infer guilt of the crime charged. Freeman's guilt was not proven beyond a reasonable doubt and the conviction must be reversed.

POINT III

Admission of the Mark Etra testimony of a remote prior bad act was reversible error.

The most that can be said of Mark Etra's testimony is that some nineteen months prior to May, 1973, around the time Etra was purchasing some hi-fi equipment from Freeman, there was some talk, initiated by Etra, about Freeman wanting to purchase quantities of cocaine from him on a regular basis which came to no more than Etra supplying Freeman with a sample of approximately one gram of

cocaine (540-9; 579-82). Etra admitted that these "negotiations" were a common method of receiving a free blow of cocaine, which is exactly what happened between Freeman and Etra. Their relationship then terminated. The court relied heavily on this testimony to reach its conclusion that Freeman was in the "cocaine business" and that Morao was Freeman's "regular source of supply" (1029) to distribute cocaine.

The court would have had to improperly reason by triple inference to make the Etra testimony relevant: First, that the Freeman-Etra *talk* about regularly purchasing large quantities was at some time otherwise realized by Freeman; Second, that this was a basis for his establishing a "cocaine business"; and Third that George Morao assumed a role Freeman "intended" for Etra.

This is not the situation present in *United States v. Stadter*, 336 F.2d 326 (2d Cir., 1964), *cert. denied*, 380 U.S. 945 (1965), relied on by the court (1029), where the prior admissible uncharged crimes showed the "organization and structure of the conspiracy as well as the individual role played by each conspirator" or where the transaction "had a bearing on the intent of the parties to commit the substantive crime of selling." *United States v. Stadter*, *supra*, at 329. The remoteness in time of the act; its lack of conformity with the offense charged (*People v. Iancullo*, 226 F. 2d 788 (7th Cir. 1955), *cert. denied*, 350 U.S. 966; its lack of bearing on the respective roles in the present conspiracy; and its lack of bearing on Freeman's attempt to *sell cocaine as opposed to buying the same*; make this testimony irrelevant for any other purpose than to show the defendant's "criminal" character or disposition or his contact with the cocaine culture.

The court's use of the Etra testimony and conclusion therefrom is in no way substantiated by the other evidence

in the case. The other evidence indicates that Freeman did purchase small amounts of cocaine from Morao for himself or to accommodate others. But with the sole exception of the one ounce sale made by George Morao at Ornitz's and Freeman's solicitation a year to a year and a half before June 1973, there was no specific evidence of purchases or accommodations by Freeman other than the Ornitz testimony about "two or three spoons, a quarter ounce" over a period of a year and a half prior to April, 1973 (840). Freeman's admission was to the effect of occasional and small "dealings" with Morao. There is no evidence of any large quantity to say nothing of kilo purchases from Morao for distribution.

The Etra testimony could not properly be combined with the evidence of occasional, remote and modest "dealings" among Freeman, Ornitz and Morao to be transmuted into proof of the indictment. But it was just this combined testimony, with primary emphasis on Etra as the base, that led to the court's unfounded conclusion that Freeman was in the "cocaine business" as a substantial dealer. Contrary to the court's conclusion, such "proof" was no more than prejudicial and irrelevant evidence of Freeman's casual involvement in the cocaine culture. Without the Etra testimony as a base, the court would have had no way to make the impermissible inferences upon inferences which it did. In both respects the court was in error. Therefore the judgment should be reversed.

POINT IV

The Court erred in denying the motion to suppress the items found in Freeman's briefcase.

A hearing was held before trial to determine: (1) the admissibility of evidence taken from Freeman's briefcase by arresting agents some three hours after his arrest; (2) the admissibility of the cocaine found in Jock Davis' possession; and (3) the admissibility of Freeman's statements to the arresting agents. The Court found that all the above were admissible (250-1).

We respectfully submit that the Court erred in all instances except the voluntariness of Freeman's statement. But we do not argue the search of Davis' bags, an issue apparently moot as the court found that the three grams of cocaine were not part of the conspiracy (696). The issue argued herein is the correctness of the Court's decision on the admissibility of the evidence found in Freeman's briefcase.

Freeman was arrested on June 19, 1973. Agent Levine frisked him for weapons and seized his briefcase (129). It was not examined at the time of arrest. Freeman was then taken to Varrick Street for questioning and processing. Levine opened the bag and went through "it item by item" while questioning Freeman. No inventory was made, though Levine had a receipt for certain items returned at a subsequent time (131-132).

The arrest was pursuant to an arrest warrant based on an affidavit of Agent Michael Levine. The affidavit stated the fact of the seizure of the five pounds of cocaine at Kennedy Airport; Marilene Tombini's admission of complicity with Rudge and Rudner in the importation; the fact that Rosalys Rudner's bags—for which the government had a

baggage check—were at the Hotel Paramount; information that Davis picked up the bags at the Paramount; Davis' payment of Rudner's hotel bill and taking of the luggage; and the fact that Davis initially gave a false explanation of his actions. The only reference to Stanton Freeman is:

"A statement by the defendant JOHN SPENCER DAVIS to your deponent that he was instructed by the defendant STANTON FREEMAN to pick up ROSALYS RUDNER'S luggage at the Hotel Paramount, New York, New York."

An arrest is unlawful if the affidavit does not give the magistrate sufficient information to support an independent judgment that probable cause existed for the arrest warrant. *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971).

The affidavit in the present case makes only one reference to Mr. Freeman—that he instructed Davis to get the Rudner luggage. Not only were no underlying circumstances supporting Davis' statement given in the affidavit, but there was no support offered that Davis was a credible informant whose information was reliable. *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 83 S. Ct. 1509 (1964). In such circumstances, the warrant was invalid and any arrest and search predicated on this warrant is also invalid.

Moreover, the actual search of Freeman's bag was not done as an inventory but was justified as a search incident to a lawful arrest. We do not here dispute the court's finding in *United States, ex rel. v. Muhammad v. Mancusi*, 432 F. 2d 1046 (2d Cir. 1970), that a search incident to arrest for weapons or fruits and implements of the crime as well as evidence of the crime can be conducted at a time and place different from the arrest. However, the present

search was not made for a weapon or for an instrumentality of the crime. It was a search conducted by the arresting agent in a careful and exploratory manner, through all of Freeman's papers, while questioning Freeman at the agent's office, in an attempt to find any information connecting Freeman with the crime. Such an exploratory search cannot be justified merely on the theory that it was incident to a lawful arrest. There must be probable cause to believe that the evidence sought will aid in a particular apprehension or conviction. *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967). Here there was no basis to believe that the papers in Freeman's briefcase would support his conviction. Indeed no specific evidence was sought. Rather, a general exploratory search was conducted. In such an instance, the search was beyond permissible bounds and the evidence must be suppressed.

CONCLUSION

For all of the foregoing reasons, the conviction should be reversed and the charges dismissed; or, in the alternative, the defendant should be granted a new trial.

Respectfully submitted,

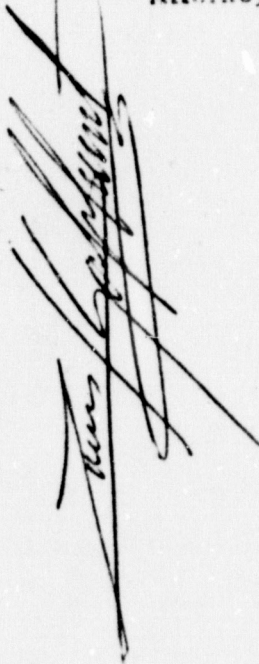
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service of these (3) copies of the within
Bry is hereby admitted
this 22 day of April, 1970

.....
Attorney(s) for

A large, stylized handwritten signature, possibly reading "Mrs. [illegible]", is written over the "Attorney(s) for" line. The signature is written in dark ink and includes several long, sweeping strokes that extend upwards and to the left.